# DOCKET

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Title: Richard D. Shapero, Petitioner
v.
Kentucky Bar Association

Docketed:
June 25, 1987

Court: Supreme Court of Kentucky

Counsel for petitioner: Cox,Donald L.

Counsel for respondent: Doheny Jr.,Frank P.

| Entry | Date | Note | Proceedings and Orders |
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| 1 | Jun 25 1987 | G | Petition for writ of certiorari filed. |
| 3 | Jul 13 1987 | | Order extending time to file response to petition until August 17, 1987. |
| 4 | Jul 29 1987 | | DISTRIBUTED. September 28, 1987 |
| 5 | Aug 14 1987 | X | Brief of respondent Kentucky Bar Assn. in opposition filed. |
| 6 | Aug 24 1987 | X | Reply brief of petitioner Richard D. Shapero filed. |
| 7 | Oct 5 1987 | | Petition GRANTED. |
| | | | ********** |
| 8 | Nov 19 1987 | | Joint appendix filed. |
| 9 | Nov 19 1987 | | Brief of petitioner Richard D. Shapero filed. |
| 10 | Dec 11 1987 | G | Motion of The Academy of Florida Trial Lawyers for leave to file a brief as amicus curiae filed. |
| 11 | Dec 15 1987 | | Record filed. |
| | | * | Certified original record received. |
| 12 | Dec 17 1987 | | Brief amicus curiae of Assn. of Trial Lawyers of America filed. |
| 14 | Dec 19 1987 | G | Motion of Florida Bar for leave to file a brief as amicus curiae filed. |
| 13 | Dec 21 1987 | | Brief of respondent Kentucky Bar Association filed. |
| 15 | Dec 21 1987 | | Brief amicus curiae of American Bar Assn. filed. |
| 16 | Dec 29 1987 | | CIRCULATED. |
| 17 | Jan 5 1988 | | SET FOR ARGUMENT. Tuesday, March 1, 1988. (1st case). (1 hour). |
| 18 | Jan 11 1988 | | Motion of The Academy of Florida Trial Lawyers for leave to file a brief as amicus curiae GRANTED. |
| 19 | Jan 11 1988 | | Motion of Florida Bar for leave to file a brief as amicus curiae GRANTED. |
| 20 | Jan 21 1988 | X | Reply brief of petitioner Richard D. Shapero filed. |
| 21 | Mar 1 1988 | | ARGUED. |

# PETITION FOR WRIT OF CERTIORARI

87-16 (1)

No. 86-

Supreme Court, U.S.
FILED
JUN 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1986

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RICHARD D. SHAPERO - - - - Petitioner

*versus*

KENTUCKY BAR ASSOCIATION - - Respondent

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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## QUESTION PRESENTED

Whether a State may employ a blanket prohibition on targeted direct mail advertising by attorneys to ban a specific mailing even though there has been no evidence that the mailing is in any way false, misleading or deceptive.

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No. 86-_____

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1986

---

RICHARD D. SHAPERO - - - - *Petitioner*

*v.*

KENTUCKY BAR ASSOCIATION - - *Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

---

Petitioner, Richard D. Shapero, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky.

## CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is reported as *Shapero* v. *Kentucky Bar Ass'n*, 726 S. W. 2d 299 (Ky. 1987), and is reproduced in the Appendix to this petition at 1a to 8a. The opinion of the Kentucky Bar Association Ethics and Unauthorized Practice Committee is reported as KBA-310, 50 *Ky. Bench & Bar*, Winter 1985-86, at 32-33, and is reproduced at 9a to 10a. The opinion of the Kentucky Attorneys Advertising Commission, styled *In re: Application of Richard Shapiro* (sic.), and dated September, 1985, is unreported, but is reproduced at 10a to 15a.

## JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on November 26, 1986. A timely petition for modification was granted, and the judgment as modified was entered on March 27, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner, Richard D. Shapero (hereafter "Shapero"), is an attorney licensed to practice law in the



Commonwealth of Kentucky. Respondent, the Kentucky Bar Association, through its Executive Director, is charged with enforcing Kentucky Supreme Court Rule 3.135 (hereinafter "SCR ——"), by which the Kentucky Supreme Court regulates legal advertising by Kentucky lawyers.

Under Kentucky law, except for certain routine advertisements which are pre-approved under SCR 3.135(a)(i), a Kentucky attorney must submit any proposed advertisement to the Kentucky Attorneys Advertising Commission (hereafter the "Advertising Commission") ". . . no fewer than 30 days before such advertisement is used." SCR 3.135(6)(b). If the advertisement is disapproved by the Advertising Commission, an appeal lies ultimately to the Kentucky Supreme Court. SCR 3.135(8)(b). In addition, an attorney who violates advertising rules may be disciplined by the Kentucky Supreme Court which takes final action on all disciplinary proceedings. SCR 3.370(6) *et seq.*

Prior to the Kentucky Supreme Court's decision in *Shapero* v. *Kentucky Bar Ass'n,* 726 S. W. 2d 299, SCR 3.135(5)(b)(i) prohibited all written advertisements, which were mailed by lawyers to persons known to be in need of legal services (hereafter referred to as "targeted direct mail advertisements"):

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or pre-

> cipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

SCR 3.135(5)(b)(i). This prohibition applied regardless of whether the advertisement was for pecuniary gain.

In 1985 this Court issued its decision in *Zauderer* v. *Office of Disciplinary Counsel,* 471 U. S. 626 (1985), holding that "[a]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients." *Id.* at 647.

After the publication of *Zauderer,* pursuant to SCR 3.135(6)(b), Shapero submitted to the Advertising Commission a letter he proposed to send to potential clients against whom mortgage foreclosure suits had been filed. The letter in its entirety stated as follows:

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by *ORDERING* your creditor to *STOP* and give you more time to pay them.
>
> You may call my office anytime from 8:30 a.m. to 5:00 p.m. for *FREE* information on how you can keep your home.
>
> Call *NOW,* don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is *FREE,* there is *NO* charge for calling.



The Advertising Commission ruled that on its face the "letter proposed is in violation of SCR 3.135(5)(b)(i) [in that it] is a letter 'precipitated by a specific event or occurrence involving or relating to the addressee or addresses as distinct from the general public.'" 11a. However, after careful analysis of *Zauderer* and other pertinent Supreme Court decisions, the Advertising Commission concluded that SCR 3.135(5)(b)(i) should be deleted by the Kentucky Supreme Court because it was violative of the First Amendment. 15a. In so doing the Advertising Commission made no finding that Shapero's direct mail solicitation created "a serious risk of overreaching, exercise of undue influence or fraud." 14a-15a.

Subsequently, in order to obtain a final decision of the Kentucky Supreme Court as provided in SCR 3.530(5), Shapero requested an opinion of the Ethics Committee of the Kentucky Bar Association about the propriety of the rule banning targeted direct mail solicitations. The Ethics Committee issued an opinion which, contrary to the Advertising Commission's opinion, upheld the ban on targeted direct mail advertising.

In April, 1986, Shapero petitioned the Kentucky Supreme Court for review of the Ethics Committee's Opinion, and on March 27, 1987, that Court issued an opinion in which it held that "[i]n view of the language of the rule as it is presently written, we are compelled by the decision in *Zauderer* to order the rule deleted." *Shapero* v. *Kentucky Bar Association,* 726 S. W. 2d at 300, 6a.

Notwithstanding this facial deference to the *Zauderer* decision, the Kentucky Supreme Court adopted a new rule and applied it retroactively to Shapero's proposed advertisement. The new rule differed from the old rule only in that it prohibited targeted direct mail advertising "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." *Id.* at 301, 8a.[1] The new rule established by the Kentucky Supreme Court was verbatim the American Bar Association's Model Rule 7.3 (1983):

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

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[1]The opinion, which was initially rendered on November 26, 1986, stated that the new rule was adopted "as the law of the case." 8a. Because it was not immediately clear the extent to which the new rule applied to other cases and other advertisements, Shapero moved the Court to modify its holding to clarify this issue. In its modified decision, the Court stated: "This is an appropriate rule which we now adopt *as the law of this Commonwealth.*" *Shapero,* 726 S. W. 2d at 301, 2a (emphasis supplied).



## HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The federal question of whether the Kentucky Supreme Court's rule prohibiting targeted, direct mail advertising was an unconstitutional abridgment of petitioner's First and Fourteenth Amendment rights was first raised below when Shapero submitted his prepared advertisement to the Advertising Commission. The Commission decided that the rule was unconstitutional. The question was then considered by the Ethics Committee, which in contrast upheld the rule.

Subsequently, petitioner raised the issue before the Kentucky Supreme Court in his petition for review. *See* Shapero's Petition at page 2. The Kentucky Supreme Court decided that the rule was unconstitutional in *Shapero* v. *Kentucky Bar Ass'n,* and modified it to prohibit targeted, direct mail advertising "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." *Shapero,* 726 S. W. 2d at 301.

In arriving at this modification of its rule, the Kentucky Supreme Court justified its decision because of "the *serious potential* for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." *Id.* (emphasis added). However, the Kentucky Supreme Court in its opinion cited no evidence or authority for this finding.

## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Conflicts with Decisions of Federal Courts of Appeals and with Decisions of the Highest Courts of Numerous States.

The decision of the Kentucky Supreme Court is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *Adams* v. *Attorney Registration & Disciplinary Commission,* 801 F. 2d 968 (7th Cir. 1986). In considering *precisely* the same challenge to a near-identical rule, the Seventh Circuit rejected the argument "that because the information contained in targeted direct mailings reaches vulnerable individuals and may be incomplete or erroneous such mailings are more like the in-person solicitation banned in *Ohralik* than the targeted newspaper advertising upheld in *Zauderer.*" *Id.* at 973. Instead, the Court of Appeals found that

> [w]hile the interest of the targeted audience in receiving the information is strong, the state concerns that underscored the Court's decision in *Ohralik* are less pressing with targeted mailings than with in-person solicitation. In this connection, individuals are less subject to harassment, overreaching and duress through mailings than they are through direct personal contact. It is easier to throw out unwanted mail than an uninvited guest. A letter may be read through several times and its contents reflected upon before a decision is made. . . . And, since targeted mailings may be presented in an honest and accurate manner, the fact that certain mailings may be erroneous or incomplete does not justify a ban on all mailings.



*Id.* at 974.

Likewise, the United States District Court for the Eastern District of Pennsylvania in striking down an absolute ban on targeted direct mail solicitation concluded that the problems addressed in *Ohralik* with in-person solicitation were not present with "direct mailings to targeted segments of the population and specifically named individuals with legal needs in these areas." *Spencer* v. *Honorable Justices of Supreme Court of Pennsylvania,* 579 F. Supp. 880, 882 (E. D. Pa. 1984), *aff'd sub nom., Spencer* v. *Supreme Court of Pennsylvania,* 760 F. 2d 261 (3d Cir. 1985).

The highest Court of New York has taken a like position. In *Koffler* v. *Joint Bar Association,* 412 N. E. 2d 927 (N. Y. 1980), *cert. denied sub nom., Joint Bar Association Grievance Committee, Tenth Judicial District* v. *Koffler,* 450 U. S. 1026 (1981), and *In re Von Wiegen,* 470 N. E. 2d 838 (N. Y. 1984), that Court reversed lower court rulings banning targeted direct mail advertising directed to real estate and personal injury clients respectively. In *Koffler,* the Court recognized that

> [i]nvasion of privacy and the possibility of overbearing persuasion, both of which were condemned in *Ohralik* and which could conceivably be present in telephone solicitation . . . are not sufficiently possible in mail solicitation to justify banning it. . . . [A] recipient of a lawyer's letter

> 'may escape exposure to objectionable material simply by transferring . . . [it] from envelope to waste basket.'

*Koffler,* 412 N. E. 2d at 933, *quoting Consolidated Edison Company* v. *Public Service Comm.,* 447 U. S. 530, 543 (1980).

Finally, in 1986 the Supreme Judicial Court of Massachusetts amended its anti-solicitation rules to allow targeted direct mail advertising. *In re Amendment to S.J.C. Rule 3:07,* 398 Mass. 73, 495 N. E. 2d 282 (1986). As to the constitutionality of rules prohibiting such advertising, the Court held:

> [b]ased on the . . . Supreme Court cases, we need not discuss the advisability, from a policy point of view, of disciplinary rules that would prohibit truthful, noncoercive, [targeted] lawyer solicitation of employment *for a fee* by such means as mail, leaflet, or electronic device, or solicitation on behalf of nonprofit organizations as in *In re Primus,* [436 U. S. 412 (1978)]. *Such rules would not be constitutional.*

*Id.* at 287 (emphasis added).

In contrast, the Kentucky Supreme Court in *Shapero* noted that "[a] state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in [the] evils" of "misleading, overbearing or involv[ing] other features of deception or improper influence." As a result, the Court concluded that "[d]irect targeted mail to a person with whom



the lawyer has no prior relationship should also be prohibited for the same reasons." *Id.* at 301, 6a.

In reaching its decision, the Kentucky High Court acknowledged that the "advertising commission [of the Kentucky Bar Association] did not find that the letter [Shapero proposed to send to potential clients] was false, misleading or deceptive," and that "the Kentucky Ethics Committee did not determine that the proposed blank-form letter was misleading, potentially misleading, deceptive or false." *Id.* at 300, 4a to 5a. Despite the Kentucky Court's awareness that "[t]he use of general advertising as distinguished from direct private contact tends to assure that information is presented without intimidation," it justified the new rule on the basis of

> the *serious potential* for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services. Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is *entirely possible* that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is *full of the possibility* of undue influence, overreaching and intimidation.

*Id.* at 301, 7a (emphasis added). In coming to these conclusions the Court failed to cite *any* evidence or authority in support of its position.

This portion of the Kentucky Supreme Court decision is also in stark contrast to the holdings of this Court in attorney advertising cases. For example, the Court held in response to arguments concerning supposed "potential abuses" of certain lawyer advertisements:

> The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorney's advertising cannot be combated by any means short of a blanket ban.

*Zauderer*, 471 U. S. at 648.

Moreover, in *In re R.M.J.*, 455 U. S. 191, 206 (1983), as a means of protecting the public from deceptive or misleading advertising directly mailed to the potential client's home, this Court suggested that a copy of the attorney's mailings be filed with the State Advisory Committee. Accordingly, the New York Court of Appeals ruled that "complete suppression is not constitutional if the State's interest can be adequately protected by more limited regulation" which it found to exist in a filing requirement for solicitation letters. *Koffler*, 412 N. E. 2d at 933. Addressing the situation in the context of personal injury litigation, the New York Court of Appeals conceeded that "it may reasonably be contended that the use of writing and the filing requirement approved in *Koffler* helps sanitize statements made in the solicitation of



personal injury cases." *In re von Wiegen*, 470 N. E. 2d at 845.

Likewise, the Supreme Court of Minnesota approved an inferior court's finding that the difficulty of enforcing prohibitions against false and deceptive advertising "was not a compelling state interest" and that "the enforcement of ethical standards would not be overly difficult if advertising is in the form of a letter and . . . the public can be assured of protection by the promulgation of a rule that requires screening of written material by the state authority." *In re Appert*, 315 N. W. 2d 204, 209 (Minn. 1981).

Kentucky's legal advertising rule requiring advance mailing of copies of the advertisement for review by the Advertising Commission contains an effective method for protecting the public from whatever dangers might be contemplated from the use of targeted direct mail advertising. Contrary to the decisions of the New York Court of Appeals and the Supreme Court of Minnesota, however, the Kentucky Supreme Court ruled that "submission of a blank form letter to the Advertising Commission [does not provide] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." *Shapero* v. *Kentucky Bar Ass'n*, 726 S. W. 2d at 301, 7a.

The opinion of the Kentucky Supreme Court in *Shapero* directly conflicts with decisions of two federal courts of appeals and several state courts of last resort interpreting this Court's legal advertising cases. These

conflicts justify the grant of certiorari to review the state court judgment in this case.

**2. The Decision Below Involves an Important Question of Federal Law Which has Nationwide Implications and Should Be Settled by This Court.**

In *Zauderer* v. *Office of Disciplinary Counsel,* this Court ruled that "[a]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding legal rights of potential clients." *Zauderer,* 471 U. S. at 647. In *Shapero* the Kentucky Supreme Court "recrafted" this language as follows to achieve its desired goal:

> In 1985, the United States Supreme Court in a plurality decision ruled that an attorney may not be disciplined for soliciting legal business through printed *newspaper* advertisements which contained truthful and nondeceptive information and advice regarding the legal rights of potential clients. *Zauderer, supra.*

*Shapero* v. *Kentucky Bar Ass'n,* 726 S. W. 2d at 300, 4a (emphasis on language inserted by Kentucky Supreme Court added).

*This* Court's conclusion was based on the principle that "[c]ommercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer,* 471 U. S. at 638. Only in-person, face-to-face solicitation "under



circumstances likely to result in [and] inherently conducive to overreaching and other forms of misconduct" has failed to pass this Court's scrutiny under this test. *Ohralik* v. *Ohio State Bar Ass'n,* 436 U. S. 447, 464 (1978). This Court has struck down as unconstitutional violations of the First and Fourteenth Amendments all other outright bans on legal advertising that have been brought to its attention. These have included targeted, direct mail advertising for non-pecuniary reasons (*In re Primus,* 436 U. S. 412); non-targeted, direct mail advertising (*In re R.M.J.,* 455 U. S. 191); and targeted, newspaper advertising (*Zauderer,* 471 U. S. 626).

The case at bar addresses the inevitable synthesis of these decisions: targeted, direct mail advertising for pecuniary reasons. The Kentucky Supreme Court's decision barring this method of advertising ignores the rule that truthful advertising may not be prophylactically restricted unless "it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse." *In re R.M.J.,* 455 U. S. at 203. The Kentucky Supreme Court, with no evidentiary support, found only the "potential" for or "possibility" of abuse. *Shapero* v. *Kentucky Bar Ass'n,* 726 S. W. 2d at 301, 7a. In fact, the Kentucky Supreme Court not only ignored this Court's standards for constitutional restrictions of commercial speech, but also ignored the critical distinction drawn by this Court between in-person solicitation and print advertising:

> [P]rint advertising generally . . . poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney.

*Zauderer* v. *Office of Disciplinary Counsel,* 471 U. S. at 642. Accordingly, this case presents an important question of federal constitutional law.

The nationwide importance of the targeted direct mail advertising issue is illustrated by the multiplicity of litigation in which this issue has arisen. In addition to the state and federal cases referred to in Section One, *supra,* at least five reported state court cases and two federal court cases have addressed the issue.[2]

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[2]*Dayton Bar Ass'n* v. *Herzog,* 436 N. E. 2d 1037, 1038 (Ohio 1982), *stay denied,* 459 U. S. 938, *cert. denied,* 459 U. S. 1016 (1982); *In re Frank,* 440 N. E. 2d 676, 677 (Ind. 1982); *Allison* v. *Louisiana State Bar Ass'n,* 362 So. 2d 489, 496 (La. 1978); *State* v. *Moses,* 231 Kan. 243, 642 P. 2d 1004, 1007 (1982); *Leoni* v. *State Bar of Cal.,* 39 Cal. 3d 609, 628, 217 Cal. Rptr. 423, 704 P. 2d 183 (1985), *appeal dismissed,* — U. S. —, 106 S. Ct. 1170 (1986); and *McKenna* v. *Champion Int'l Corp.,* 747 F. 2d 1211, 1216 n. 7 (8th Cir. 1984).



Moreover, the new Kentucky Rule, which is verbatim American Bar Association Model Rule 7.3,[3] has also been adopted by Idaho, Nevada, North Carolina, Washington, and Wyoming. Virginia, New Jersey, and Minnesota adopted the Model Rules but deleted any prohibition against targeted direct mail advertising. Montana, Missouri, Maryland, Connecticut, Delaware, New Hampshire, Florida, Mississippi, and Louisiana adopted the Model Rules but amended Rule 7.3 to allow targeted direct mail advertising with varying safeguards such as those recommended by the Kutak Commission. Arizona, Arkansas, and Indiana adopted a version of Rule 7.3 that is more restrictive than the Model Rule. See 2 ABA/BNA Lawyer's Manual on Professional Conduct 45 at Section 01:3 (April 15, 1987), and 2 ABA/BNA Lawyer's Manual on Professional Conduct 42 at Sections 01:11 through 01:24 (January 21, 1987).

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[3]In 1983 the House of Delegates of the American Bar Association refused to adopt the proposal of the Commission on Evaluation of Professional Standards (the "Kutak" Commission) to amend Model Rule 7.3 to permit targeted, direct mail advertising unless "(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; (2) the prospective client has made known to the lawyer a desire not to receive communications from the lawyer; or (3) the communication involves coercion, duress or harassment." Federal Trade Commission Staff Report, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising, at D-3 (1984). A similar amendment proposed by the ABA ethics committee and its advertising commission was withdrawn from consideration by the House of Delegates at its meet-

*(Footnote Continued on Next Page)*

Even in view of the apparent clarity of this Court's holdings and the unanimity of their impact on lower court decisions as shown in Section One, *supra,* the decisions of state bar association ethics committees on the targeted direct mail issue have been surprisingly diverse.[4]

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*(Footnote Continued From Preceding Page)*

ing in February, 1987, after the Board of Governors voted to urge the House of Delegates to reject the amendment. 2 ABA/BNA Lawyer's Manual on Professional Conduct 24 at 479-80 (December 24, 1986).

[4]Alabama State Bar Disciplinary Commission, Opinion 86-98 (October 21, 1986) (State cannot constitutionally prohibit direct mail solicitation that is not false or misleading); Arizona Ethics Opinion 83-5 (January 19, 1983) (Direct mail to potential clients is not a permissible form of client solicitation); California Ethics Opinion 1980-54 (1980) (An attorney may not send unsolicited letters to particular potential clients regarding any specific case or matter involving the potential client); Georgia Ethics Opinion 34 (March 11, 1983) (Lawyers may solicit professional employment by direct mail but mail solicitation that is prompted by a specific occurrence related to the recipient presents a potential for overreaching); Kansas Ethics Opinion 84-2 (May 23, 1984) (Lawyer employed by bank may not mail letters to bank customers soliciting business for financial planning program in which lawyer is involved); Maine Ethics Opinion 16 (October 15, 1980) (Letter written by lawyers stating that legal relief may be available for recent personal injury of a relative of recipient may be prohibited); Massachusetts Ethics Opinion 82-5 (March 10, 1982) (A lawyer may not recommend his employment by direct mail); Michigan State Bar Committee on Professional and Judicial Ethics, Opinion CI-1163 (September 9, 1986) (Lawyer may not send direct mail advertising to survivors of and dependents of victims killed in airplane crash); Tennessee Supreme Court Board of Professional Responsibility, Formal Opinion 84-F-78 (October 17, 1984) (Lawyer may send direct mail communication to defaulting mortgagors whose homes are advertised for foreclosure); Texas

*(Footnote Continued on Next Page)*



In view of the importance of targeted direct mail advertising to all attorneys, the national scope of ABA Model Rule 7.3, the apparent confusion among state bar associations about this Court's precedents, the extent of the litigation on the targeted direct mail issue and the conflict between the Kentucky Supreme Court's decision and other state and federal court decisions, the granting of certiorari to review the judgment below is justified.

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*(Footnote Continued From Preceding Page)*

Ethics Opinion 414 (February 3, 1984) (Direct mail solicitation of nonclients is permissible); Utah State Bar Ethics Committee, Opinion 75 (February 21, 1986) (Lawyer may mail to specific groups of potential clients letters that do not concern specific events or causes of action); Virginia State Bar Standing Committee on Legal Ethics, Opinion 904 (April 1, 1987) (Lawyer may send form letters, if truthful, to prospective clients facing foreclosure, advising them that bankruptcy filing may be appropriate and inviting them to contact him); Wisconsin State Bar Committee on Professional Ethics, Opinion E-84-13 (September, 1984) (Law firm may send letter detailing its specific areas of practice to union members in specific geographic area so long as letter is not false, misleading, deceptive, or unfair). *See* ABA/BNA Lawyer's Manual on Professional Conduct.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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# APPENDIX

# SUPREME COURT OF KENTUCKY

**86-SC-335-KB**

---

RICHARD D. SHAPERERO - - - - - *Petitioner*

*v.*

KENTUCKY BAR ASSOCIATION - - - *Respondent*

---

IN SUPREME COURT

---

## ORDER

This Court's Order entered herein on March 12, 1987 is vacated and set aside.

The joint motion of petitioner and respondent to hold in abeyance is denied.

The petition for modification or extension of this Court's opinion rendered on November 26, 1986, is granted. Page seven of the original opinion is deleted, and a new page seven, attached hereto, is substituted in lieu thereof.

ENTERED March 27, 1987.

(s) Robert F. Stephens
Chief Justice

in Kentucky provides as follows:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

This is an appropriate rule which we now adopt as the law of this Commonwealth.

We affirm the decision of the Ethics Committee to deny the request.

Stephens, C.J., and Gant, Lambert, Leibson, Stephenson, and Wintersheimer, JJ., concur. Vance, J., dissents.

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RENDERED. NOVEMBER 26, 1986
TO BE PUBLISHED

# SUPREME COURT OF KENTUCKY

**86-SC-335-KB**

---

RICHARD D. SHAPERO - - - - - - *Petitioner*

*v.*

KENTUCKY BAR ASSOCIATION - - - *Respondent*

---

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

---

**AFFIRMING**

This is a petition for review of Supreme Court Rule 3.135(5)(b)(i) which has been interpreted by the advertising commission to prohibit direct targeted mail advertising by lawyers.

The question is whether the rule violates the First and Fourteenth Amendments to the United States Constitution.

Shapero argues that the targeted direct mail advertising rule does not advance a substantial governmental interest and the rule is more restrictive than necessary in view of the holding of the United States Supreme Court in *Zauderer* v. *Office of Disciplinary Counsel,* 471 U. S. ___, 85 L. Ed. 2d 652, 670, 105 S. Ct. ___ (1985).

Supreme Court Rule 3.135(5)(b)(i) provides:

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time,

and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

In 1985, the United States Supreme Court in a plurality decision ruled that an attorney may not be disciplined for soliciting legal business through printed newspaper advertisements which contained truthful and nondeceptive information and advice regarding the legal rights of potential clients. *Zauderer, supra.*

Following the *Zauderer* decision, Shapero, a Louisville attorney, pursuant to SCR 3.135(6)(b), submitted to the Lawyers' Advertising Commission of the Kentucky State Bar Association, the blank form of a letter he proposed to send to potential clients who had a foreclosure suit filed against them. The advertising commission determined that the letter proposed is a violation of SCR 3.135(5)(b)(i) because it is a letter precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public. The advertising commission did not find that the letter was false, misleading or deceptive. Thereafter, Shapero requested an opinion from the Ethics Committee of the Kentucky Bar Association about propriety of the proposed letter. The Ethics Committee disapproved the submitted form of direct-mail letter. Shapero then petitioned this Court for review of the Advisory Opinion and the rule which was granted.

The rule as now written which was interpreted by the Advertising Commission and the Ethics Committee to be in conflict with the interpretation of the United States Supreme Court of the First and Fourteenth Amendments to the United States Constitution as expressed in *Zauderer* should be deleted.



In that case, the United States Supreme Court determined that lawyer advertising is a form of commercial free speech protected by the First Amendment and that advertising by attorneys may not be subjected to blanket suppression. The specific cases involved newspaper advertising; this case involves direct targeted mail.

*In re R.M.J.*, 455 U. S. 191, 71 L. Ed. 2d 64, 102 S. Ct. 929 (1982), quoting *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977) holds that while misleading advertising may be prohibited entirely, the states may not place an absolute prohibition on certain types of potentially misleading information if the information also may be presented in a way that is not deceptive. The state may exercise its authority to regulate legal advertising only when it can assert a substantial interest and the interference with commercial free speech must be in proportion to the interests served. *In re R.M.J., supra.* The United States Supreme Court has struck down bans on legal advertising that include targeted direct mail advertising for nonpecuniary reasons. *See In re Primus,* 436 U. S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978).

The Ethics Committee cited Rule 7.3 of the Model Rules of Professional Conduct which were adopted by the American Bar Association several years before the United States Supreme Court's decision in *Zauderer* which prohibits solicitation for pecuniary gain. However, the Kentucky Ethics Committee did not determine that the proposed blank-form letter was misleading, potentially misleading, deceptive or false. The Model Rules have been proposed in Kentucky but never formally adopted.

The crux of the matter is whether the state has a substantial governmental interest that is directly served by prohibiting solicitation by direct targeted mailing sent to potential clients known to have a specific legal problem and

whether the targeted direct mail may be prohibited because it is improper solicitation and the rule is in proportion to the governmental interest served.

In view of the language of the rule as it is presently written, we are compelled by the decision in *Zauderer* to order the rule deleted.

It is the decision of this Court that Supreme Court Rule 3.135(5)(b)(i) be deleted.

The state is free to fashion any reasonable restriction with respect to time, place and manner of solicitation by the members of its bar association. *In re Primus, supra.* The state has a recognizable governmental interest in regulating members of the professions it licenses and who serve as officers of the courts which justifies the application of rules to prohibit solicitation that is misleading, overbearing or involves other features of deception or improper influence. A state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in those evils. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978). Direct targeted mail to a person with whom the lawyer has no prior relationship should also be prohibited for the same reasons.

*Ohralik, supra,* held that the in-person solicitation of business by a lawyer was so fraught with potential for wrongdoing and so difficult to police that it justified the establishment of a prophylactic measure preventing it. The courts have recognized the difference between the protection of commercial free speech which occurs in an area traditionally subject to governmental regulation and other varieties of speech where the same types of regulations might be improper.

*Ohralik* specifically found that the free speech element is an essential but subordinate component of a situation



of in-person solicitation by a lawyer of a potential client. We agree.

This Court is not unmindful of the serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services. Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation.

As provided in the Model Rules which are now under consideration by this Court and members of the Kentucky Bar Association, as well as current rules, advertising makes it possible for a potential client to be informed about the need for legal services and about the qualifications of available lawyers without subjecting them to direct personal pressure. The use of general advertising as distinguished from direct private contact tends to assure that information is presented without intimidation.

We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation.

Such dangers result from direct solicitation whether in person or by mail. General mailings not addressed to a specific situation do not have the same danger for abuse as direct targeted mailing.

The model rule, *Rule 7.3,* which is proposed for adoption in Kentucky provides as follows:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has

> no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

This is an appropriate rule which we adopt as the law of the case.

We affirm the decision of the Ethics Committee to deny the request.

Stephens, C.J., and Leibson, Stephenson, White and Wintersheimer, JJ., concur. Gant, J., concurs in result. Vance, J., dissents.

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**KENTUCKY BENCH & BAR** (Publication)

E-310

QUESTION: May an attorney write a letter and send it by regular mail to a specific individual that the lawyer has identified as being in need of the attorney's legal services?

ANSWER: NO.

OPINION

Several requests for advisory opinions have been forwarded to the Attorneys Advertising Commission and the Ethics Committee seeking approval of "targeted direct-mail advertising" to potential tort plaintiffs, victims of foreclosures, etc. Such target individuals can be readily identified in a perusal of the daily newspapers.

In response, the Attorneys Advertising Commission issued an opinion denying one of these requests under the authority of SCR 3.135(5)(b)(i), which provides:

> (b)(i) A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

When this rule is read alongside the definition of "advertising" contained in SCR 3.135(2), it is clear that the rule classifies as prohibited "solicitation" mailed communications to individuals known to have specific legal problems. The Commission applied the rule as written, despite argu-

ments relating to the validity of the rule after *Zauderer* v. *Office of Disciplinary Council*, ___ U. S. ___, 105 S. Ct. 2265 (1985).

The Code of Professional Responsibility also prohibits this sort of client recruitment. DR 2-104(A) and SCR 3.130.

The Special Committee on the Model Rules of Professional Conduct is in the process of reviewing, amending and presenting new standards to replace the Code. Model Rules 7.1 and 7.2, like SCR 3.135, permit thruthful, nonmisleading advertising. However, the ABA version of Model Rule 7.3 still prohibits "solicitation" for "pecuniary gain". The rule provides in pertinent part:

> The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Consequently, the latest word from the ABA is consistent with SCR 3.135. In addition, it is possible to reconcile these standards with *Kentucky Bar Association* v. *Stuart*, 568 S. W. 2d 933 (1979), which "approved" an attorney's mailings to commercial businesses, which were not inspired by a particular event.

## KENTUCKY ATTORNEYS ADVERTISING COMMISSION

IN RE: APPLICATION OF RICHARD SHAPIRO

This matter is before the Commission on a matter that is clearly answered by our Rules, but which presents a



difficult question to the Commission under its responsibility to recommend rule changes. SCR 3.135(3)(e)(ii).

The applicant proposes to write a letter to be sent by regular mail to persons against whom real estate foreclosure actions have been filed, advising them of the possibility that a bankruptcy proceeding might help with their problems and informing them of applicant's availability as an attorney handling bankruptcy matters. On the face of it, the letter proposed is in violation of SCR 3.135(5)(b)(i). We have no difficulty finding it is a letter "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."

Our problem concerns the validity of that regulation in view of the recent holdings of the United States Supreme Court on the subject of attorney advertising. *Zauderer* v. *Office of Disciplinary Council of Supreme Court of Ohio*, ___ U. S. ___, 105 S. Ct. 2265 (1985); In Re R.M.J., 455 U. S. 191 (1982); *In Re Primus*, 436 U S. 437 (1978); *Ohralik* v. *Ohio State Bar Association*, 436 U. S. 447 (1978). We must view this problem in light of our rule which requires pre-filing with the Commission of any such written solicitation. RCR 4.135(6) (sic.).

In sum, the question before us, in considering whether or not to recommend changes, is whether the state can establish interests of sufficient magnitude in this situation to override the public's interest in receiving information on the availability of legal services. In other words, is there danger of deception or overreaching presented by mailings to persons who because of some specific event may have an unusual need for a lawyer, or an unusual interest in having a lawyer explain to them their legal rights.

The problem is the tension that exists between the right of the state to regulate commercial advertising of

the sort involved here and the right of free speech under the First Amendment to the Constitution of the United States. It should be noted that the regulation involved is a restriction on the time, place and manner of speech and it is not a restriction on content. We have no rules which prevents an attorney from placing an advertisement of this type in a medium of general circulation. Such a rule would be improper. *Zauderer* v. *Office of Disciplinary Council of the Supreme Court of Ohio, supra.* The state is free to fashion reasonable restrictions with respect to the time, place and manner of solicitation by the members of its bar. *In Re Primus, supra.* The state does have a recognized interest in regulating members whose profession it licenses, and who serve as officers of its courts. These special interests amply justify the application of narrowly drawn rules to proscribe solicitation that is in fact misleading, overbearing or involves other features of deception or improper influence. A state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in those evils. *Ohralik* v. *Ohio State Bar Assocaition, supra.*

The question to be answered is whether our rule restricting direct mail solicitation is drawn sufficiently narrow to prevent only those circumstances likely to result in misleading, overbearing, deception or improper influence, or whether the state interest could be satisfied by other, less restrictive means.

In *Ohralik* the Supreme Court ruled that the in-person solicitation of business by a lawyer was so fraught with potential for wrongdoing and so difficult to police that it justified the establishment of prophylactic measures preventing it. The courts recognized the difference between the protection of commercial free speech which occurs in an area traditionally subject to governmental regulation,



and other varieties of speech where the same types of regulation might be impermissible.

In *Ohralik* the Court specifically found that the free speech element is an essential but subordinate component of a situation of in-person solicitation by a lawyer of a prospective client. Unlike a public advertisement which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demand an immediate response without providing an opportunity for comparison or reflection. Under those circumstances, there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities or persons close to the solicited individual. Such situations are inherently conducive to overreaching and other forms of misconduct. The potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed lay person. Under such circumstances, the Court held, it is not unreasonable for the state to presume that an in-person solicitation by lawyers more often than not will be injurious to the person solicited.

Our situation here is somewhat different. The question we have before us is whether it is unreasonable for the state to presume, by the present regulations, that the direct mail solicitation by lawyers will more often than not be injurious to the person solicited. If we cannot make that presumption then we have little basis to justify our regulation. This is particularly true in view of our regulations which require pre-filing of such solicitations, so that the Commission has the opportunity to view these solicitations before they are received by the addressee.

The most recent case from the Supreme Court, *Zauderer*, does not specifically answer our question, but has language which suggests that our present regulation can-

not be justified. That case makes it clear that while the state is free to prevent dissemination of commercial speech that is false, deceptive or misleading, where such activities are not involved speech may be restricted only as a result of substantial governmental interests through means that directly advance that interest. Blanket bans are impermissible, but rules prohibiting in-person solicitation are under some circumstances permissible. That case went on the point out the difference between face-to-face solicitation and print advertising generally, which poses much less risk of overreaching or undue influence.

While the *Zauderer* decision does seem to be based on the recognition that Ohio was regulating the content of the advertisement involved, not necessarily the time, place or method chosen for the solicitation, it is still evident from that decision that a written letter is quite different from a personal encounter and does not bear the same possibilities for overreaching, invasion of privacy, exercise of undue influence and outright fraud that justifies the proscription on in-person solicitation. *Zauderer* emphasizes that restrictions involving commercial speech that is not deceptive must be narrowly crafted to serve the state's purposes.

We must analyze the basis for preventing the direct mail solicitation here involved. Under our regulations we will be able to review the content of such solicitation because of our pre-filing requirements. Certainly, it is not improper for an attorney to advertise generally that he is able to represent individuals who have a specific problem or who have suffered as a result of a specific set of circumstances. Can it be wrong to direct this advertising specifically to those he is able to identify as being in a particular position most likely to benefit from legal services? Unless we can say that the sort of direct mail solicitation involved here creates a serious risk of overreaching, exercise of undue influence or fraud, we cannot justify a blanket prohibition. It is not sufficient justification to limit advertising because it had a tendency or did in fact encourage the filing of lawsuits. The bottom line in *Zauderer* is this:



> An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding legal rights of potential clients.

105 S. Ct. at 2280.

In summary, we believe the regulation involved should be amended by the Kentucky Supreme Court in view of decisions discussed herein because of its impact on the First Amendment to the Constitution and the free speech provisions contained therein. However, until such amendment we have no choice but to disapprove the proposed advertisement as it does violate existing rules. We therefore find as follows:

1. The proposed advertisement of the Applicant is in violation of SCR 3.135(5) and it is not approved;
2. We recommend that the Advertising Rules be amended so that SCR 3.135(5)(b)(i) is deleted.

Dated this ____ day of September, 1985.

(s) Lindsey Ingram
Lindsey W. Ingram, Jr. Chairman
Attorneys Advertising Commission

# OPPOSITION

# BRIEF

(2)

No. 87-16

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

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RICHARD D. SHAPERO - - - - Petitioner

OUTING

KENTUCKY BAR ASSOCIATION - - Respondent

---

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

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## RESPONDENT'S BRIEF IN OPPOSITION

---

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Due Date:
August 17, 1987

WESTERFIELD-SONTE CO., 519 W. KENTUCKY—P.O. BOX 3331, LOUISVILLE, KY.

99 pp

## QUESTION PRESENTED

Whether the Supreme Court of Kentucky, without violating Petitioner's rights under the First Amendment, may refuse to approve a form of letter submitted by Petitioner which in an overbearing, coercive and undignified manner would solicit law business for Petitioner from vulnerable persons not known to Petitioner but whom Petitioner regards as potential clients.

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IN THE

# SUPREME COURT OF THE UNITED STATES

**October Term, 1987**

**No. 87-16**

---

RICHARD D. SHAPERO - - - - *Petitioner*

*v.*

KENTUCKY BAR ASSOCIATION - - *Respondent*

---

## RESPONDENT'S BRIEF IN OPPOSITION

---

Respondent, Kentucky Bar Association, states herein its opposition to the grant of a writ of certiorari to the Supreme Court of Kentucky.

### OPINION BELOW

The opinion of the Supreme Court of Kentucky in *Richard D. Shapero, Petitioner* v. *Kentucky Bar Association, Respondent,* was handed down November 26, 1986 and was modified March 27, 1987. It is reported in 726 S. W. 2d 299 and, as so reported, is reproduced in the Appendix to this brief at 1a.

### CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 116 of the Constitution of Kentucky, which reads as follows:

> The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners

and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

## STATEMENT OF THE CASE

The sole issue in this case is whether the Supreme Court of Kentucky violated Petitioner's constitutional rights when it refused to approve a form of letter by which Petitioner would solicit employment for himself as a lawyer by persons theretofore unknown to him, against whom mortgage foreclosure suits had been filed. The letter read (App. 13a):

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor to STOP and give you more time to pay them.
>
> You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.
>
> Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember, it is FREE, there is NO charge for calling.

In the petition, Petitioner refers to the proposed letters as "targeted direct mail advertisements". "Advertisement" is not, however, the word that truly conveys what the Petitioner is attempting to do. Petitioner is attempting to solicit business, pure and simple.



Petitioner is also seeking to litigate the same issue in the United States District Court for the Western District of Kentucky, in action No. 83-0129-L(B). In a response served July 10, 1987, Petitioner stated on page 3 that he has petitioned the United States Supreme Court for review of *Shapero* v. *Kentucky Bar Association,* Ky., 726 S. W. 2d 299 (1987), "in which the Kentucky Supreme Court ruled that Shapero could not mail certain targeted letters of solicitation to potential clients known to need the particular assistance offered." Again, at page 4 of the same document, in footnote 3, Petitioner stated: "Shapero's action in the state court arose out of the Advertising Commission's refusal to permit him to mail a targeted letter of solicitation to a potential client." These statements are significant because they constitute acknowledgment by Petitioner that the proposed letters are targeted letters of solicitation directly seeking legal employment, sent to a specific individual known to have an immediate and pressing legal need.

The Kentucky Bar is a unitary bar, very similar in its organization to the State Bar of Arizona as reflected in *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977). Because the Kentucky Bar Association is an arm of the Supreme Court of Kentucky, it cannot properly be sued in any of the other courts of Kentucky, the Supreme Court of Kentucky being the only forum in which a controversy concerning the Bar Association can be heard and resolved. *Ex Parte Auditor of Public Accounts,* Ky.,

609 S. W. 2d 682 (1980). All those admitted to the practice of law in Kentucky are members of the Kentucky Bar Association. Please see Kentucky Supreme Court Rule (SCR) 3.030 (App. 20a). The mission ard purpose of the Kentucky Bar Association is stated in SCR 3.025 (App. 19a) and includes the maintenance of a proper discipline of the members of the bar in accordance with the Rules of the Supreme Court of Kentucky.

The governing body of the Kentucky Bar Association is its Board of Governors. SCR 3.070 (App. 23a) states that the Board is "the agent of the Court for the purpose of administering and enforcing the Rules." The bylaws of the Kentucky Bar Association are subject to the approval of the Supreme Court of Kentucky (SCR 3.090, App. 24a), and the Kentucky Bar Association's annual budget must be submitted to and receive the approval of the Supreme Court of Kentucky (SCR 3.120, App. 27a).

SCR 3.135 (App. 30a-39a) makes provision for an Attorneys Advertising Commission. Decisions of the Commission, after appeal to the Board of the Kentucky Bar Association, may be reviewed by the Supreme Court of Kentucky. Petitioner did not follow this route but sought an ethics ruling pursuant to SCR 3.530 (App. 77a-78a) and then sought review of that ruling (App. 14a-16a).

SCR 3.530 (App. 77a-78a) provides that any Kentucky attorney may petition the Director of the Kentucky Bar Association for an advisory opinion about



the propriety of any professional act contemplated by him. The Director is to transmit the petition to the Committee on Legal Ethics. The Committee may furnish the petitioner with an informal opinion on the subject or request the Board of the Kentucky Bar Association to issue a formal opinion concerning it. Here, the Board issued a formal opinion, No. E-310 (appendix to petition 9a). Any person aggrieved by an opinion of the Board may file with the Clerk of the Kentucky Supreme Court a copy of the opinion, and upon motion and reasonable notice in writing to the Director obtain a review of the Board's opinion by the Court. It is the Supreme Court's ruling on review of the Board's opinion, which ruling disapproved Petitioner's letter of solicitation, for which Petitioner seeks review by this Court.

The Supreme Court of Kentucky, in its opinion upon review (App. 4a-5a), immediately recognized that its then Rule 3.135(5)(b)(i) "should be deleted" because it unduly restricted the use of written advertisements by lawyers. It so concluded as a result of the holding of this Court in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).

The rule having been deleted, the Supreme Court of Kentucky proceeded to consider the merits of Petitioner's proposed targeted letter of solicitation. After due deliberation fully articulated in its opinion, the Supreme Court of Kentucky concluded that Petitioner's letter of solicitation should not be approved,

and it affirmed the decision of the Bar Association Board in the ethics case to deny Petitioner's request for permission to send out his proposed letters. Explaining its reasons for refusing approval of Petitioner's targeted letter of solicitation, the Court stated (pp. 300-301, App. 5a):

> The state is free to fashion any reasonable restriction with respect to time, place and manner of solicitation by the members of its bar association. *In re Primus, supra.* The state has a recognizable governmental interest in regulating members of the professions it licenses and who serve as officers of the courts which justifies the application of rules to prohibit solicitation that is misleading, overbearing or involves other features of deception or improper influence. A state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in those evils. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). Direct targeted mail to a person with whom the lawyer has no prior relationship should also be prohibited for the same reasons.

Going on, the Court stated (page 301, App. 6a):

> This Court is not unmindful of the serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services. Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation.



The Court further stated (page 301, App. 6a):

> We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation.
>
> Such dangers result from direct solicitation whether in person or by mail. General mailings not addressed to a specific situation do not have the same danger for abuse as direct targeted mailing.

Consonant with its ruling concerning the Petitioner's proposed targeted letter of solicitation, the Supreme Court of Kentucky adopted Rule 7.3 of the Model Rules of Professional Conduct, forbidding lawyers from soliciting professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, whether the solicitation be by mail, in person, or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The rule defines "solicit" as including contact in person, by telephone or telegraph, by letter, or other writing, or by other communication directed to a specific recipient. It states that "solicit" does not include letters addressed or

advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

## REASONS FOR DENYING THE WRIT

### 1. The Supreme Court of Kentucky has a Broad Discretion as to Whether it will Allow Solicitation of Business by Kentucky Lawyers, and its Decision Should Not be Reexamined by this Court.

The Supreme Court of Kentucky did not infringe upon Petitioner's constitutional rights when it refused to approve the sending by Petitioner of letters of solicitation directed to vulnerable individuals, urging his employment as their attorney. The proposed letter is not a mere objective statement of Petitioner's availability, a general advertisement. It fairly shouts at the recipient. It figuratively grasps the recipient by the lapels and tries to convince the recipient that he should employ the Petitioner. We call attention to the use in the letter of words in underscored capital letters. We invite attention especially to the last paragraph, where the recipient receives the peremptory command: "Call NOW, don't wait." This is followed by the enigmatic sentence, "It may surprise you what I may be able to do for you." There is no possible justification for this sentence. It states no affirmative fact. It is pure salesman's puffery, enticement for the unsophisticated, which commits Petitioner to nothing. There is then the reiteration: "Just call and tell me that you got this letter." And then the sentence:



"Remember it is FREE, there is NO charge for calling."

This is a letter directly seeking legal employment sent to a targeted individual with a known legal need. This is not advertising. This is solicitation, high pressure solicitation, overbearing solicitation. The gullible recipient is intended to be overwhelmed.

Petitioner's form of letter is not unlike the flyer which was condemned in *Eaton* v. *Supreme Court of Arkansas*, Ark., 607 S. W. 2d 55 (1980), certiorari denied 450 U. S. 966, 67 L. Ed. 2d 615, 101 S. Ct. 1483 (1981). Eaton and Benton included their flyer in a mail-out packet mailed by Val-Pak Advertising to 10,000 households in North Little Rock. The flyer asked "NEED A LAWYER?" in bold face and then stated "FIRST CONSULTATION — $10." The Arkansas Supreme Court held that the flyer was not designed to inform consumers but to solicit them to employ Eaton and Benton. It agreed with its Committee on Professional Conduct that the flyer was "merely a lure to get customers into the advertiser's place of business" (607 S. W. 2d at 60).

The Supreme Court of Kentucky has long recognized the distinction between proper *advertising and* improper *solicitation*.[1] In *Kentucky Bar Assn.* v.

[1]This Court also recognized the distinction between solicitation and advertising in the *Ohralik* case, discussed *infra*, when it said (436 U. S. at 455) that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services. . . ."

*Stuart*, Ky., 568 S. W. 2d 933 (1977) (App. 8a), the Kentucky Bar Association charged two lawyers with unethical conduct because they mailed letters to two real estate agencies on two different days bringing to the attention of the recipients the fact that "our office handles all aspects of legal work concerning real estate transactions." The letter set forth the fees for three different services, guaranteed that every Opinion of Title is researched by an approved attorney who is a member of the Kentucky Bar Association, and also guaranteed 48-hour service in most cases. The letter ended by thanking the recipient "for your time and consideration in this matter." The Board of Governors of the Kentucky Bar Association found that the letters constituted "in-person solicitation", not advertising, and recommended a public reprimand for the attorneys. The Supreme Court of Kentucky disagreed and ordered the complaint dismissed. The Court held (page 934, App. 10a): "The letters contain no words generally associated with solicitation."

Obviously, letters to real estate agents such as found in *Stuart* would fail within the exception of Rule 7.3 permitting such letters to be sent to persons not known to need legal services in a particular matter, but who are situated so that there might be a need for legal services in the future.

Kentucky's highest court (then the Court of Appeals), in *Kentucky State Bar Assn.* v. *Stivers*, Ky., 475 S. W. 2d 900 (1972), certiorari denied 406 U. S. 968, 32 L. Ed. 2d 666, 92 S. Ct. 2412, disciplined a



lawyer for writing six or seven letters of solicitation parallel to the ones Petitioner seeks to write. Stivers addressed his letters to those shown by the local newspaper to have been involved in auto accidents. He stated in one letter that he handled cases of that sort and was in position to represent the addressee. He invited the addressee to call him if he could be of service. The court condemned the letters as soliciting employment for the purpose of instituting litigation.

Letters of solicitation which shout commands to the individual, targeted recipient in words in underscored capitals are of a different order from advertising and are subject to proscription. It is to be recalled that this Court has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression" (*Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978). Indeed, this Court observed in the same case that "[e]xpression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently." (436 U. S. at 455). The Court also held (436 U. S. at 457) that "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component." This circumstance "lowers the level of appropriate judicial scrutiny" (436 U. S. at 457).

If advertising occupies a low place in the scale of First Amendment values, and it does, Petitioner's overbearing, coercive and undignified letters of solicitation directed to vulnerable persons are off the scale altogether. As said in *Ohralik* (436 U. S. at 459):

> A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. . . .

*Ohralik* involved in-person solicitation, whereas Petitioner would solicit by letters in the form earlier described. The Supreme Court of Kentucky, noting (p. 301, App. 6a) "the serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services", concluded (p. 301, App. 6a) that "[s]uch dangers result from direct solicitation whether in person or by mail."

The Supreme Court of Louisiana reached a similar conclusion as to solicitation by letter in *Allison* v. *Louisiana State Bar Assn.*, La., 362 So. 2d 489 (1978), holding that while solicitation by letter was not fraught with as many undesirable possibilities as face-to-face solicitation, it was direct solicitation nevertheless and was properly prohibited. So did the Supreme Court of Kansas in *State* v. *Moses*, Kan., 642 P. 2d 1004 (1982), where Moses solicited those trying to sell their homes. And the Supreme Court of Indiana in *In the Matter of James J. Frank*, Ind., 440 N.E. 2d 676 (1982), condemned the action of Frank in writing letters of



solicitation to approximately twenty persons accused of driving under the influence of alcohol, Frank having obtained the names from court records.

This is the crux of the case: Should this Court reexamine the judgment-call of the Supreme Court of Kentucky concerning Petitioner's form of letter? We submit that this Court should not, for it is the Supreme Court of Kentucky which has the responsibility for the proper conduct of Kentucky lawyers, and its conclusion carries with it a presumption of correctness. Petitioner's constitutional rights are not infringed because he is not allowed to speak as he pleases in commercial solicitation by letter.

### 2. Petitioner's Letter Would be Objectionable even Under a Rule Permitting Proper Solicitation by Mail.

Even under a rule permitting targeted mailing of a dignified advertisement, Petitioner's letter would fail.

To explain, even if the rule authorized what Justice Marshall, concurring in *Ohralik*, called "benign commercial solicitation" Petitioner would not be helped because his proposed letter would not qualify. Justice Marshall thus defined "benign commercial solicitation" (436 U. S. at 473):

> By "benign" commercial solicitation, I mean solicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or

reject the representation with respect to a legal claim or matter that is not frivolous.

Petitioner's letter, we submit, is coercive and undignified, and it is addressed to potential clients who are emotionally incapable of making a rational decision to accept or reject Petitioner's representation with respect to a legal matter that is not frivolous.

### 3. Rule 7.3 May Properly be Adopted in Kentucky.

Petitioner has devoted much of his petition to comparing Rule 7.3 of the Model Rules of Professional Conduct, adopted by the Supreme Court of Kentucky in this case, to rules in effect in other States. He likewise argues for nationwide uniformity.

That States other than Kentucky may permit solicitation by letter by their lawyers does not mean that Kentucky must do likewise. It is a commonplace for the several sovereign States to have differing rules. Each, within its jurisdiction, is entitled to do as it finds to be best, provided always that Federal constitutional requirements are observed. It is therefore not significant that other States, for reasons they find sufficient, permit solicitation by letter. Kentucky, for reasons which it finds sufficient, does not permit such solicitaion.

Petitioner shows at page 18, in footnote 4, that of the thirteen States which he mentioned, nine may be said to be opposed to the idea of soliciting by letter while four may be said to approve it. Such a pattern



is not surprising. It merely shows the autonomy of the States and the lack of uniformity in this area. There is no need for uniformity and none should be imposed . Each State should be left free to decide for itself whether to permit or prohibit solicitation by letter.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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*Counsel of Record*

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# APPENDIX

# APPENDIX



## SUPREME COURT OF KENTUCKY

RICHARD D. SHAPERO, - - - - - - *Petitioner*,

*v.*

KENTUCKY BAR ASSOCIATION - - - *Respondent*.

November 26, 1986.
As Modified March 27, 1987.

**Attorney petitioned for review of advisory opinion of Ethics Committee of State Bar Association regarding propriety of proposed direct targeted mail advertising to persons with nonspecific legal problem. The Supreme Court, Wintersheimer, J., held that: (1) ethical rule prohibiting solicitation by lawyers for pecuniary gain was invalid; (2) submission of blank form letter to bar association advertising commission did not provide suitable protection to public from overreaching, intimidation or misleading private targeted mail solicitation; and (3) rule prohibiting lawyers from solicitating persons known to need legal services of kind provided by lawyer in particular matter by letter or other writing, as well as in person, by telephone or telegraph would be adopted.**

**So ordered.**

**Gant, J., concurred in result.**

**Vance, J., dissented.**

**1. Constitutional Law—Key 90.2**

**Rule of professional conduct prohibiting solicitation for pecuniary gain by attorneys was invalid to extent it restricted commercial free speech. Sup. Ct. Rules, Rule 3.135 (5)(b)(i); U.S.C.A. Const. Amends. 1, 14.**

**2. Attorney and Client Key 32(9)**

State did not have substantial governmental interest directly served by prohibiting solicitation by attorneys for pecuniary gain where proposed blank form letter was not found to be misleading, potentially misleading, deceptive or false. Sup. Ct. Rules, Rule 3.135(5)(b)(i); U.S.C.A. Const. Amends. 1, 14.

**3. Attorney and Client Key 32(9)**

Process of submitting blank form letter to advertising commission of state bar association did not provide suitable protection to public from overreaching, intimidation or misleading private targeted mail solicitation by attorneys; thus court would adopt rule prohibiting lawyer from contacting persons known to need legal services of a kind provided by the lawyer in particular matter by letter or other writing, as well as by personal contact, telephone or telegraph.

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Donald L. Cox and Mary Janice Lintner, Lynch, Sherman & Cox, Louisville, for petitioner.

Bruce K. Davis, Director, Kentucky Bar Ass'n, Frankfort, for respondent.

WINTERSHEIMER, Justice.

This is a petition for review of Supreme Court Rule 3.135(5)(b)(i) which has been interpreted by the advertising commission to prohibit direct targeted mail advertising by lawyers.

The question is whether the rule violates the First and Fourteenth Amendments to the United States Constitution.

Shapero argues that the targeted direct mail advertising rule does not advance a substantial governmental interest and the rule is more restrictive than necessary in



view of the holding of the United States Supreme Court in *Zauderer* v. *Office of Disciplinary Counsel,* 471 U. S. 626, 647, 105 S. Ct. 2265, 2280, 85 L. Ed. 2d 652, 670 (1985).

Supreme Court Rule 3.135(5)(b)(i) provides:

> A written advertisement may be sent or delivered to an individual addressee only if that addresse is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

In 1985, the United States Supreme Court in a plurality decision ruled that an attorney may not be disciplined for soliciting legal business through printed newspaper advertisements which contained truthful and nondeceptive information and advice regarding the legal rights of potential clients. *Zauderer, supra.*

Following the *Zauderer* decision, Shapero, a Louisville attorney, pursuant to SCR 3.135(6)(b), submitted to the Lawyers' Advertising Commission of the Kentucky State Bar Association, the blank form of a letter he proposed to send to potential clients who had a foreclosure suit filed against them. The advertising commission determined that the letter proposed is a violation of SCR 3.135(5)(b)(i) because it is a letter precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public. The advertising commission did not find that the letter was false, misleading or deceptive. Thereafter, Shapero requested an opinion from the Ethics Committee of the Kentucky Bar Association about propriety of the proposed letter. The Ethics Committee disapproved the submitted form of direct-mail

letter. Shapero then petitioned this Court for review of the Advisory Opinion and the rule which was granted.

[1] The rule as now written which was interpreted by the Advertising Commission and the Ethics Committee to be in conflict with the interpretation of the United States Supreme Court of the First and Fourteenth Amendments to the United States Constitution as expressed in *Zauderer* should be deleted.

In that case, the United States Supreme Court determined that lawyer advertising is a form of commercial free speech protected by the First Amendment and that advertising by attorneys may not be subjected to blanket suppression. The specific cases involved newspaper advertising; this case involves direct targeted mail.

*In re R.M.J.*, 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982), quoting *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) holds that while misleading advertising may be prohibited entirely, the states may not place an absolute prohibition on certain types of potentially misleading information if the information also may be presented in a way that is not deceptive. The state may exercise its authority to regulate legal advertising only when it can assert a substantial interest and the interference with commercial free speech must be in proportion to the interests served. *In re R.M.J., supra.* The United States Supreme Court has struck down bans on legal advertising that include targeted direct mail advertising for nonpecuniary reasons. *See In re Primus*, 436 U. S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978).

The Ethics Committee cited Rule 7.3 of the Model Rules of Professional Conduct which were adopted by the American Bar Association several years before the United States Supreme Court's decision in *Zauderer* which prohibits solicitation for pecuniary gain. However, the Kentucky Ethics Committee did not determine that the proposed



blank-form letter was misleading, potentially misleading, deceptive or false. The Model Rules have been proposed in Kentucky but never formally adopted.

[2] The crux of the matter is whether the state has a substantial governmental interest that is directly served by prohibiting solicitation by direct targeted mailing sent to potential clients known to have a specific legal problem and whether the targeted direct mail may be prohibited because it is improper solicitation and the rule is in proportion to the governmental interest served.

In view of the language of the rule as it is presently written, we are compelled by the decision in *Zauderer* to order the rule deleted.

It is the decision of this Court that Supreme Court Rule 3.135(5)(b)(i) be deleted.

The state is free to fashion any reasonable restriction with respect to time, place and manner of solicitation by the members of its bar association. *In re Primus, supra.* The state has a recognizable governmental interest in regulating members of the professions it licenses and who serve as officers of the courts which justifies the application of rules to prohibit solicitation that is misleading, overbearing or involves other features of deception or improper influence. A state may forbid in-person solicitation for pecuniary gain under circumstances likely to result in those evils. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). Direct targeted mail to a person with whom the lawyer has no prior relationship should also be prohibited for the same reasons.

*Ohralik, supra,* held that the in-person solicitation of business by a lawyer was so fraught with potential for wrongdoing and so difficult to police that it justified the establishment of a prophylactic measure preventing it. The courts have recognized the difference between the protection of commercial free speech which occurs in an area

traditionally subject to governmental regulation and other varieties of speech where the same types of regulations might be improper.

*Ohralik* specifically found that the free speech element is an essential but subordinate component of a situation of in-person solicitation by a lawyer of a potential client. We agree.

This Court is not unmindful of the serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services. Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation.

As provided in the Model Rules which are now under consideration by this Court and members of the Kentucky Bar Association, as well as current rules, advertising makes it possible for a potential client to be informed about the need for legal services and about the qualifications of available lawyers without subjecting them to direct personal pressure. The use of general advertising as distinguished from direct private contact tends to assure that information is presented without intimidation.

[3] We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation.

Such dangers result from direct solicitation whether in person or by mail. General mailings not addressed to a specific situation do not have the same danger for abuse as direct targeted mailing.



The model rule, *Rule 7.3*, which is proposed for adoption in Kentucky provides as follows:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

This is an appropriate rule which we now adopt as the law of this Commonwealth.

We affirm the decision of the Ethics Committee to deny the request.

STEPHENS, C. J., and GANT, LAMBERT, LEIBSON, STEPHENSON, and WINTERSHEIMER, J.J., concur.

VANCE, J., dissents.

# SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION, - - - *Complainant,*

*v.*

FLORA STUART and
KELLY D. THOMPSON, - - - - *Respondents.*

July 3, 1987.

The Bar Association sought to impose discipline for alleged personal solicitation of legal business. The Supreme Court held that letters merely stating the prices charged for routine legal services involved in real estate transactions, the qualifications of the writers to perform the services and the time period in which the services would be rendered by the law firm do not constitute "in-person solicitation."

Complaint dismissed.

**1. Attorney and Client Key 32**

Letters, written on law office stationery, which attorneys mailed to two real estate agencies did not constitute "in-person solicitation" in violation of the Code of Professional Responsibility where the letters contained no words generally associated with solicitation but merely stated the prices charged for routine legal services involved in real estate transactions, the qualifications of the writers to perform the services and the time period in which the services would be rendered by the law firm; letters did not constitute "in-person solicitation" any more than any other form of advertising. ABA Code of Professional Responsibility, DR2-103(A).

See publication Words and Phrases for other judicial constructions and definitions.



**2. Constitutional Law Key 90.1(1)**

Advertising by attorneys is constitutionally protected unless the bar association can justify prohibiting such advertising by an interest that outweighs individual and societal interests in commercial speech.

Leslie G. Whitmer, Director, Kentucky Bar Ass'n, Frankfort, for complainant.

PER CURIAM

[1] Stuart and Thompson are before us charged with engaging in unprofessional and unethical conduct by the Kentucky Bar Association because they mailed letters to two real estate agencies on their law office stationery which allegedly directly and personally solicited legal business. The two letters upon which this complaint is based were mailed on June 15, 1977 and June 30, 1977. The body of the letters reads as follows:

> "This is to advise you that our office handles all aspects of legal work concerning real estate transactions. Our fees are as follows:
>
> | | |
> |---|---|
> | Opinion of title: | 50.00 |
> | Deed preparation: | 15.00 |
> | Mortgage preparation: | 15.00 |
>
> We guarantee that every Opinion of Title from our office is researched by an approved attorney who is a member of the Kentucky Bar Association. We also guarantee that if there are no objections to title or encumbrances which must be resolved as to the title, that our opinion will be delivered to the lending institution within 48 hours of the date of your order.
>
> We thank you for your time and consideration in this matter.

Sincerely yours,
Thompson & Stuart"

After a full hearing the Trial Committee of the Association determined that the letter violated Disciplinary Rule 2-103(A) of the Code of Professional Responsibility[1] and recommended that Stuart and Thompson receive a private reprimand. The Board of Governors agreed finding that the letters constituted "in-person solicitation," not advertisement, and recommended that Stuart and Thompson receive a public rather than a private reprimand.

This court is not persuaded that the letters in this case constitute "in-person solicitation" any more than any other form of advertising.[2] *See Ohralik* v. *Ohio State Bar Ass'n*, __ U.S. __, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). The letters contain no words generally associated with solicitation. *See In re Primus*, __ U. S. __, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978); *Kentucky State Bar Ass'n* v. *Donoghoe*, Ky., 486 S. W. 2d 703, 704-05 (1972).

None of the evils are present here which exist in the case of "in-person solicitations." There is not even the danger of exertion of pressure or demands to encourage a person to make a speedy and possibly uninformed decision whether to seek an attorney's assistance with a problem. *Ohralik* v. *Ohio State Bar Ass'n, supra*, __ U. S. at __, 98 S. Ct. at 1919, 56 L. Ed. 2d at 454. The letters merely state the prices charged for routine legal services involved in real estate transactions, the qualifications of those to perform the services and the time period in which the services would be rendered by the law firm. All three of these statements are susceptible of precise measurement and verification. *See Bates* v. *State Bar of Arizona*, 433 U. S. 350, 375-77, 383-84, 97 S. Ct. 2691, 2704-05, 2708-09, 53 L. Ed. 2d 810, 830-31, 835-36 (1977).

[1] "A laywer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."

[2] Compare definition of advertise Black's Law Dictionary 74 (4th ed. 1968) with solicit *Id.* at 1564.



[2] It is now beyond dispute that advertising by attorneys is constitutionally protected, unless the Association can justify prohibition of such speech by an interest which will outweigh individual and societal interests in the commercial speech. *Bates* v. *State Bar of Arizona, supra*, 433 U. S. at 363-65, 97 S. Ct. at 2698-2700, 53 L. Ed. 2d at 823-24. Because the letters are a form of advertisement and not "in-person solicitation," they are protected, unless the Association can demonstrate sufficient justification for prohibition.

The only significant difference between the letters in this case and the form of advertisement in *Bates* v. *State Bar of Arizona, supra*, is that one was published in a newspaper and the other by mailing letters to real estate agencies. It is argued that by permitting private mailings two evils may result which do not exist in the case of newspaper advertisement and that this creates a sufficient interest to justify prohibition. First, there is greater potential for over-reaching and deceptive practices by unscrupulous attorneys. Second, enforcement of ethical standards of attorney advertising will become difficult, if not impossible for the Association.

In all advertising there is the potential for over-reaching and deceptive statements. The fact that an advertisement is in the form of a letter does not increase the likelihood of these evils occurring. *Bates* v. *State Bar of Arizona, supra*, 433 U. S. at 368-79, 97 S. Ct. at 2698-2700, 53 L. Ed. 2d at 826-832; *see generally Ohralik* v. *Ohio State Bar Ass'n, supra; In re Primus, supra.* The letters in this case do not suffer from either of these evils and the written form provides a record of what was stated as protection

against such abusive conduct. As to the second possible evil the prosecution of this very case demonstrates that enforcement of ethical standards of attorney advertising will not be impossible or overly difficult because it is allowed to take the form of a letter. Ample protection may be assured the public by promulgation of a rule which requires the attorney to mail a copy of such advertisements to the Association simultaneously with the mailing of one or more of them to members of the public.

In short the Association has failed to demonstrate a sufficient justification for prohibition of advertising by letter.

The complaint is dismissed at the cost of the Association.

All concur.



[LETTERHEAD OF RICHARD D. SHAPERO & ASSOCIATES]

June 28, 1985

_____

569 Main Street
Joytown, Kentucky 0000

Dear Mr. _____:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor to STOP and give you more time to pay them.

You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

Very truly yours,

RICHARD D. SHAPERO & ASSOCIATES

RICHARD D. SHAPERO
Attorney at Law

RDS:rjc/G105/FC.LTR

# KENTUCKY SUPREME COURT

**Action No. _____**

EX PARTE RICHARD SHAPERO

Comes Richard Shapero, pursuant to Kentucky Constitution Section 110(2)(a), SCR 3.530(5), and the holding of this Court in *Ex Parte Auditor of Public Accounts,* Ky., 609 S. W. 2d 682 (1980), and petitions the Court as follows:

1. The Petitioner, Richard Shapero, is an attorney licensed to practice law in the Commonwealth of Kentucky;

2. On July 8, 1983, this Court adopted SCR 3.135 which regulates advertising by attorneys within the Commonwealth of Kentucky.

3. SCR 3.135(5)(b)(i) provides as follows:

> A written advertisement may be sent or delivered to an individual addressee *only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.* (Emphasis supplied)

4. Pursuant to the holding of the United States Supreme Court's holding in *Zauderer* v. *Office of Disciplinary Counsel,* __ U. S. __, 105 S. Ct. 2265 (1985), this regulation is unconstitutional as prohibiting written solicitations by an attorney of a client.

5. Petitioner sought a determination by the Ethics Committee of the Kentucky State Bar Association permit-



ting him to "write a letter and send it by regular mail to a specific individual that the lawyer has identified as being in need of the attorney's legal services." The Ethics Committee of the Kentucky State Bar Association determined that such a letter could not be sent citing SCR 3.135(5)(b)(i). 50 *Ky. Bench & Bar* 32-33 (1985-86), attached as Exhibit A. The Ethics Committee's Advisory Opinion followed an Opinion of the Kentucky Attorneys Advertising Commission stating that the above rule of this Court is probably unconstitutional in view of the *Zauderer* decision, recommending "that the regulation involved should be amended by the Kentucky Supreme Court in view of [*Zauderer*] because of its impact on the First Amendment to the Constitution and the free speech provision contained therein" and stating that "until such amendment we have no choice but to disapprove the proposed advertisement." Exhibit B at p. 6.

WHEREFORE, the Petitioner, Richard Shapero, respectfully requests that this Court exercise the power granted it by Section 110(2)(a) of the Kentucky Constitution "to issue all writs necessary . . . to exercise control of the Court of Justice" and, pursuant to SCR 3.530(5), review the attached Opinion of the Kentucky State Bar Association to determine that SCR 3.135(5)(b)(i) is violative of the First and Fourteenth Amendments to the United States Constitution in view of the holding by the United States Supreme Court in *Zauderer* v. *Office of Disciplinary Counsel, supra,* and to declare this rule void.

Respectfully submitted,

(s) Mary Janice Lintner
Donald L. Cox
Mary Janice Lintner
LYNCH, SHERMAN & COX
1800 Meidinger Tower
Louisville, Kentucky 40202
(502) 589-4215

Attorney for Petitioner

[Exhibits A and B and Certificate of Service have not been reproduced.]



## EXTRACT FROM THE RULES OF THE SUPREME COURT OF KENTUCKY

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### RULE 3. THE PRACTICE OF LAW

THE ORGANIZATION AND GOVERNMENT OF THE BAR AND PROCEDURE IN DISCIPLINARY CASES

**Rule 3.010 General Definitions**

As used throughout this Rule 3, the following definitions shall apply unless the context clearly requires a different meaning:

"Association" is the Kentucky Bar Association.

"Attorney" is a person licensed or authorized to practice law.

"Board" is the board of governors of the association.

"Bylaws" means the bylaws of the association.

"Chairman" means the chairman of the house of delegates.

"Chairman-elect" means the chairman-elect of the house of delegates.

"Charge" means the pleading by which the association charges an attorney with unprofessional conduct.

"Circuit clerk" is the clerk of the court of respondent's present or last known residence.

"Clerk" is the clerk of the Supreme Court of Kentucky.

"Commission" is the continuing legal education commission.

"Committee" means the committee on character and fitness defined in Rule 2.040.

"Complainant" means the party who causes to be initiated an investigation of an attorney, or who causes to be initiated a proceeding under Rule 3.160. The complainant may be a person or entity.

"Court" is the Supreme Court of Kentucky.

"Delegate" is a member of the house of delegates of the association.

"Director" is the director of the association.

"District" means a prescribed geographical and political area of the state.

"Governor" is an elected member of the board.

"House" means the house of delegates of the association.

"Law student" means any person enrolled in an approved law school who has successfully completed the first year therein.

"Member" means an attorney in good standing as required by the rules of the court.

"Officer" means a member elected or appointed pursuant to the rules.

"President" is the president of the association.

"President-elect" is the president-elect of the association.

"Registrar" is the registrar of the association.

"Respondent" is an attorney against whom a charge is filed.

"Rules" are the rules of the court.

"Section" means a body of members actively interested in and promoting improvements in a particular branch of law

"Time" is computed as under the Rules of Civil Procedure.

"Treasurer" is the treasurer of the association.

"Trial commissioner" means the commissioner appointed pursuant to the provisions of Rule 3.230, Rule 3.510, and Rule 3.520.

"Tribunal" means the inquiry tribunal appointed by the chief justice to determine whether probable cause exists for filing a charge.



"Vice-chairman" is the vice-chiarman of the house of delegates.

"Vice-president" is the vice-president of the association.

**Rule 3.020 Practice of Law Defined**

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument in which he is a party without consideration unto himself therefor. An appearance in the Small Claims Division of the District Court by a person who is an officer of or who is regularly employed in a managerial capacity by a corporation or partnership which is a party to the litigation in which the appearance is made shall not be considered as unauthorized practice law.

**Rule 3.025 Kentucky Bar Association**

The mission and purpose of the Assoication is to maintain a proper discipline of the members of the bar in accordance with these Rules and with the principles of the legal profession as a public calling, to initiate and supervise, with the approval of the Court, appropriate means to insure a continuing high standard of professional competence on the part of the members of the bar, and to bear a substantial and continuing responsibility for promoting the efficiency and improvement of the judicial system.

**Rule 3.030 Membership, Practice by Nonmembers and Classes of Membership**

(1) All persons admitted to practice law in this state shall be, and they are, members of the Association upon the completion of the prerequisites under Rule 2.100.

(2) A person licensed to practice in another state, but not in this state, shall be permitted to practice a case in this state only if he subjects himself to the jurisdiction and Rules of the Court governing professional conduct and engages a member of the Assoication as co-counsel, whose presence shall be necessary at all trials and at other times when required by the court.

(3) The Association, by its By-Laws, may create honorary memberships. All other attorneys are active members.

**Rule 3.040 Dues; Date of Payment and Amount**

(1) On or before July 1 of each year every member of the Association, including every Justice or Judge of the Kentucky Court of Justice and United States Judge in or who is appointed from or maintains a residence in Kentucky, except Board-designated honorary members, shall pay to the Treasurer, as dues or a bar registration fee for the ensuing twelve months beginning September 1, such sums as may be fixed by the Supreme Court on recommendation of the Board; provided, however, that any member of the bar may be relieved of the payment of dues by reason of undue hardship arising from disability, sickness, age or financial condition. A Governor from the district in which the attorney lives may recommend in writing to the President that such relief be granted, giving his reasons therefor. Thereupon, the President shall have the authority to notify the Treasurer by written order that the attorney is relieved of the payment of dues and the President shall file with the Registrar both the recommendation of the Governor and his own order.



(2) Any member of the Association shall be relieved of the payment of dues for any fiscal year in which he serves actively for a period of not less than six months in the armed services of the United States of America, other than as a career member of the armed forces.

**Rule 3.050 Collection of Dues; Suspension for Non-payment**

As soon as practicable after August 20th of each year, the Treasurer shall notify a member in writing of his delinquency. If such member remains delinquent on the 10th day of the following September, the Treasurer shall, forthwith, in writing, certify his name to the Court. The Clerk shall docket the matter and the Court shall issue to such member a rule returnable twenty days thereafter, requiring the respondent to show cause why he should not be suspended from the practice of law. Unless good cause be shown by the return day of the rule or within such additional time as may be allowed by the Court, an order shall be entered suspending respondent from the practice of law. An attested copy of the order shall forthwith be delivered by the Clerk to the member, the Director, and the circuit clerk of the member's residential district for recording and indexing as required by Rule 3.480. The suspended member may apply for reinstatement to membership under the provisions of Rule 3.500.

**Rule 3.060 Records to Show Status of Members**

(1) The records of the Association shall show the status as to membership and standing of each member and former member of the Association. Specifically, those records shall show at least the following data:

(a) As to each present member of the Association concerning whom the information is known, and as to each new member hereafter admitted, the date of his admission

to the bar and where the Court's order granting him such admission to practice law may be found.

(b) When known, the fact and date of each member's death.

(c) The fact and date of each honorary membership, the reason therefor, and, when the honorary membership terminates, the fact and date of such termination and the reason therefor.

(d) The final disposition of each motion to resign, and where the Court's order finally disposing of each such motion may be found, and, where the motion to resign is sustained, the effective date of the resignation.

(e) The effective date of each disbarment, suspension and reinstatement and where the Court's judgment or order of disbarment, suspension or reinstatement may be found, and in the case of suspension, the length of time for which the respondent has been suspended.

(f) In the case of any disciplinary action other than disbarment or suspension (as, for instance, public reprimand), the date when such disciplinary action was ordered, where the Court's judgment or order directing such disciplinary action may be found, and the date when and manner in which such judgment or order was carried out.

(g) The final disposition of each contemplated proceeding brought against a former member of the Association under the provisions of Rule 3.460, and where the Court's judgment or final order in such proceeding may be found, and the date and manner in which the punishment, if any, adjudged therein was inflicted.

(h) Disciplinary complaints filed with the Director pursuant to Rule 3.160(1) against attorneys that have been dismissed by the Inquiry Tribunal shall be maintained by the Director for a period of one (1) year after final disposition of the complaint.



(i) Those records which are disciplinary complaints against attorneys that have resulted in discipline of attorneys shall be maintained by the Director until five (5) years after the death of the attorneys.

(j) At the end of the period stated in paragraphs (h) and (i) of this Rule, the Director shall destroy the described complaints and/or records

**Rule 3.070 The Board; Functions and Membership**

The Board is the governing body of the Association and the agent of the Court for the purpose of administering and enforcing the Rules. It shall consist of the President, the President-Elect, the Vice-President, the Chairman of the House of Delegates, the Chairman-Elect, the immediate Past President, the Chairman of the Young Lawyer's Section, who is a non-voting member, and two attorneys elected from the membership of the Association in each appellate district of the state as presently existing or hereafter created.

**Rule 3.080 Selection and Tenure of Board of Governors; Filing Vacancies on the Board**

The elected members of the Board for each appellate district shall be nominated and elected, in the manner prescribed in the By-Laws, by the members of the Association residing in the appellate district. Each Governor shall hold office for two years and/or until his successor is elected and qualified. No Governor who has served three consecutive full terms, after July 1, 1971, shall be eligible to again serve without at least one term of said office intervening. The terms of the two Governors from each appellate district shall expire in alternate years. By-Laws shall provide for an annual election, to be held simultaneously in all appellate districts in which more than one person has been nominated as Governor, for the purpose of electing

successors to those governors whose terms of office shall expire. Any vacancy on the Board may be filled for the remainder of the term in such manner as the By-Laws may prescribe. The KENTUCKY BAR & BENCH (sic) shall in the April and July issues prior to the expiration of the term of Governor carry a notice to the membership of the expiration.

**Rule 3.090 Duties and Powers of the Board**

It shall be the Board's duty to perform the functions prescribed in Rule 3.070, and it shall have power to do everything necessary or appropriate to enable it to perform those functions. The Board shall adopt By-Laws, subject to the approval of the Court and not in conflict with these Rules, relating to the performance of its functions and providing for the conduct of its business. The Board's power to perform its function as the governing body of the Association expressly includes the power to engage in any program designed to educate and inform the bar and the public.

**Rule 3.100 Officers of the Board and Association**

The officers of the Board shall be a President, a President-Elect, a Vice President, a Director, a Treasurer, a Registrar and such other officers as the By-Laws may provide for. The Registrar shall be appointed by and hold office during the pleasure of the Chief Justice of the Court. The Registrar shall perform the duties required of him by the Rules, keep the records required by Rule 3.060, keep an indexed file of advisory opinions rendered pursuant to Rule 3.530, and perform such other duties as the Court may from time to time prescribe for him. He shall maintain an office in Frankfort, Kentucky. The offices of Director, Registrar and Treasurer may, but need not, be held by the same person. The manner of selection, tenure and duties of other officers shall be prescribed in By-Laws.



**Rule 3.110 The House; Functions, Membership, Terms and Vacancies**

The House of Delegates shall consist of a number of representatives of each judicial district equal to the number of circuit judges presiding therein. The members shall advise with the Board; coordinate programs of the Association calculated to improve the administration of justice; and perform such other functions and duties as may be delegated to it by the Board. Upon appointment members shall serve as Trial Commissioners. Members of the House shall report to the Director all cases of unauthorized and unethical practice within their respective districts. They shall be elected for terms of two years and no member of the House who has served three consecutive full terms after July 1, 1971, shall be eligible to again serve without at least one term of said office intervening. Officers of the House shall be selected from and by its own membership; and vacancies shall be filled in such manner as the By-Laws provide. The limitation of three (3) consecutive two (2) year terms does not apply to officers of the House; however, members of the House who have served six (6) or more consecutive years, including terms as an officer of the House, shall not be eligible to serve again without an intervening term. Each Past President shall be a member of the House unless he is a member of the Board of Governors or serving as a member of the Inquiry Tribunal in which event he shall not, during that period, be a member of the House.

**Rule 3.115 Bar Center Headquarters**

(1) A Board of Trustees of the association's Bar Center Headquarters is created. It shall consist of the President, ex officio, a non-voting executive director appointed by the Trustees, and six members of the association, three ap-

pointed by this Court and three by the Board of Governors. Both this Court and the Board of Governors shall appoint persons for staggered terms of three years each, commencing December 1 of the year of appointment.

(2) The powers and duties of the Trustees shall include the right to act for and in the name of the association with respect to all matters incident to the ownership, management and control of the Bar Center Headquarters to be located in Frankfort, and for the purpose of carrying out such purposes, the right:

(a) To hold the legal title to all real estate acquired in the future for the Bar Center Headquarters Building, and to acquire and hold, by lease, purchase, gift, bequest or devise, such additional real estate as may reasonably be required for additions to or incident to the reasonable use of the Bar Center Headquarters Building.

(b) To construct, purchase, lease or otherwise acquire such additions to a Bar Center Headquarters Building as may reasonably be required, to incur such indebtedness as may be required in the opinion of the Trustees in order to finance the acquisition of additional land for and additions to the Bar Center Headquarters Building, and to secure the payment of such indebtedness by mortgage or pledge of the property, real and personal, of the trust.

(c) To control, manage, and maintain the Bar Center Headquarters Building and all real and personal property incident thereto.

(d) To receive and accept any gifts, devises and bequests of real and personal property, and to hold, sell, mortgage, expend, invest, reinvest and otherwise control and use the same or the proceeds thereof for any purposes incident to the Bar Center Headquarters Building.

(e) To accept and hold in trust real and personal property given, devised and bequeathed for any use and purpose germane to the acquisition, maintenance and expansion of



the Bar Center Headquarters Building, and to administer such trust in accordance with the terms thereof.

(f) To institute, intervene in, or defend any action or proceeding at law or in equity in any state or Federal Court wherein any issue involving the Trustees, the real or personal property within their charge, or the trust is or may be presented.

(g) The Trustees shall, annually on or before September 15 of each year, render to this Court and to the Board of Governors of the association, or more often if either shall so direct, a complete account of their administration and transactions.

**Rule 3.120 Fiscal Provisions**

(1) The dues and bar registration fees prescribed in Rule 3.040 shall constitute a general fund to provide for the ordinary and necessary expenses of the operation of the Kentucky Bar Association, including, as appropriate, compensation of employees; expenses of the Board and officers; publications; maintenance of the client's security fund and the bar center fund and the discharge of the disciplinary, educational and other functions specified by these rules. Other fees, subscriptions, and contributions authorized by these Rules or approved by the court shall constitute a special fund or funds to provide for the specific purpose or purposes of each such collection including the annual and midyear conventions and other undertakings for which specific collections are authorized. Excesses in the special fund may be transferred to the general fund on order of the Board.

(2) An annual budget including all income and expenditures shall be prepared by a committee composed of the president-elect and two members of the Board appointed by him; the chairman-elect of the house and two

members of the house appointed by him; and the director. The president-elect shall act as chairman.

(3) Not less than four (4) months prior to the commencement of the next fiscal year, the budget shall be submitted by the Board to the court for its approval. The Board shall include in its budget proposal the budget of the Continuing Legal Education Commission. The budget shall distinctly set forth expected revenues according to source, together with carry-over funds from the previous year, and shall list budgeted amounts for each category of expenditure in sufficient detail to identify clearly the nature of the respective expenditures.

(4) Upon approval by the court, the budget shall govern the fiscal operations of the Association. Each expenditure category may be increased or decreased by not more then ten (10) percent. Further departures from the budget allotments may be made only upon approval of the court.

(5) All receipts of the Association shall be recorded in a cash receipts journal and deposited promptly. Each repository of funds and bank account shall be designated by the Board and approved by the court.

(6) All disbursements shall be in accordance with the budget, made by the treasurer and recorded in a cash disbursements journal. Each check shall bear such countersignatures as the Board may direct.

(7) The director, treasurer and such other employees as the Board designates shall be bonded for the accounting of all funds collected. The bonds shall be in the amount or amounts specified by the Board.

(8) There shall be an annual audit of the Association by the Administrative Office of the Courts or, at the election of the court, a private accounting firm approved by the court. The report of the audit shall be submitted to the court. Each annual audit shall be paid for by the Association.



(9 The compensation of employees of the Association shall be fixed by the Board.

(10) Printing and purchasing shall be regulated by procedures established through the Administrative Office of the Courts.

**Rule 3.125 Travel**

(1) In the conduct of business for, or the representation of the Association, committee members when specifically authorized, board members, members of the house, officers, commission members, representatives, and employees shall be reimbursed for lodging, meals and travel expenses upon submission of receipts for such expenses. Reimbursements shall not exceed the following:

Nightly lodging, per diem (with a maximum of three nights for any one trip)—$50.00.

Meals, tips, taxis and necessary incidentals, per diem—$25.00.

(2) Travel at a rate not to exceed airline tourist fares; provided, however, that for trips by automobile a rate of 25¢ per mile may be allowed if airline travel is not reasonably available or if the trip is (a) less than 150 miles, one-way, or (b) is entirely within this state.

(3) Within the above limits the expenses of the spouse of the president, president-elect and director shall be reimbursed for attendance at the Kentucky and American Bar meetings, and for attendance at the Kentucky Bar meetings the spouse of the Chief Justice of the Supreme Court.

(4) Whenever it appears to the Board that the above limitations will result in unfair hardship because actual expenses exceed the limits fixed, the Board may allow additional reimbursements.

**Rule 3.130 ABA Code of Professional Responsibility and Judicial Conduct Recognized as Authority**

(1) Except for Ethical Considerations and Disciplinary Rules in conflict with Rule 3.135, the Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the Inquiry Tribunal may cause to be tried all charges brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into desrepute.

(2) Members of the Association's Lawyers Helping Lawyers Committee or a subcommittee thereof shall be under no ethical obligation to disclose to the Inquiry Tribunal any evidence of unethical or unprofessional conduct discovered in the course of the committee's work, nor shall any committee member testify before a trial commissioner concerning a respondent in a disciplinary case without the written consent of the respondent. On request of any person or entity, a member of the committee or subcommittee shall inform the inquiring party of its right to file a complaint under the provisions of Rule 3.160.

**Rule 3.135 Advertisement of Legal Services**

**(1) Applicability.** This rule shall apply to advertisements in any way related to or concerning legal services, which are directed to residents of the Commonwealth of Kentucky, or which originate in the Commonwealth of Kentucky.

**(2) Definitions.** For purposes of this rule, the following definitions shall apply:

(a) "Advertise" means to furnish any written, printed or broadcast information containing an attorney's name or any other identifying information, except the following:



(i) A professional card of an attorney identifying him by name and as a lawyer, and giving his addresses, telephone numbers, and the name of his law firm. A professional card of a law firm may also give the names of members and associates.

(ii) A brief professional announcement card stating new or changed associations or addresses, or change of firm name, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonable necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession.

(iii) A routine telephone book listing, containing only the information specified in Subsection (i) of this Section. Each separate office maintained by an attorney may have a separate telephone listing.

(iv) A sign on or near the law office and in the building directory identifying the law office and containing only the information specified in Subsection (i) of this Section.

(v) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and associates. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of

a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) "Legal services" means the practice of law as defined in Rule 3.020.

**(3) Attorneys Advertising Commission**

(a) There shall be created an Attorneys Advertising Commission (hereafter Commission) which shall perform such functions in regulating attorney advertising as prescribed in this rule. The purposes of the Commission are to aid lawyers to ethically advertise and to protect the public.

(b) The commission shall consist of three (3) persons appointed by the President and approved by the Board. Each of the three (3) members of the Commission shall be appointed on or before the first day of July, 1983 for staggered term as follows: one (1) shall serve until the first day of July, 1984, one (1) until the first day of July, 1985, and one (1) until the first day of July, 1986, and thereafter for a term of three (3) years and until a successor is appointed. Vacancies for unexpired terms shall be filled in the same manner as original appointees, but the appointee shall hold office only to the end of the unexpired term. Members of the Commission may serve successive terms, and may be removed at any time by a majority vote of the Board.

(c) Each Commission member shall be a citizen of the United States, licensed to practice law in the courts of this Commonwealth.

(d) The Commission shall be provided with sufficient administrative assistance from the Director as from time to time may be required.



(e) The Commission shall have general responsibilities for the implementation of this Rule. In discharging its responsibilities the Commission shall have authority to:

(i) Issue and promulgate regulations and such forms as may be necessary, subject to prior approval by the Board. Each member of the Association shall be given at least 60 days advance notice of any proposed regulations and an opportunity to comment thereon. Notice may be given by publication in the state journal of the Kentucky Bar Association.

(ii) Report to the Board at its last meeting preceding the annual convention of the Association, and otherwise as required, on the status of advertising with such recommendations on changes in these Rules or the Commission regulations or forms as advisable.

(iii) Hold hearings, subpoena witnesses and documents and administer oaths or delegate this authority to a Commission member or a hearing officer who shall proceed in the name of the Commission.

(f) The Commission shall prepare a budget for the succeeding year and shall submit same to the Board of Governors for inclusion with the budget of the Association as provided by Rule 3.120(3).

(g) A quorum to do business in meetings of the Commission shall consist of not fewer than two of its members in attendance; provided, however, that one member, or a hearing officer appointed by the Commission may conduct hearings and in any emergency where a quorum is unavailable one member may issue a notice of proposed disapproval under Rule 3.135(7).

**(4) General Prohibitions.** An attorney shall not, on behalf of himself, his partner, associate, or any other attorney affiliated with him or his firm, use or participate in the use

of any form of advertisement containing a statement or claim which is false or tends to be misleading, deceptive, or unfair, or which is self-laudatory rather than designed to inform the public.

**(5) Specific Prohibitions and Requirements**

(a) An advertisement is deemed to violate Rule 3.135(4) if it:

(i) Contains a misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not misleading;

(ii) Is likely to create an unjustified expectation about results the attorney can achieve, or states or implies that the attorney can achieve results by means that violate the rules that govern the practice of law in Kentucky or law applicable to the work to be undertaken.

(iii) Compares the attorney's services with another attorney's services, unless the comparison can be factually substantiated; or

(iv) Is of a category of advertisements which has been found by the Commission based upon its experience to be likely to violate Rule 3.135(4). Any such finding by the Commission shall occur only upon notice and opportunity for comment as provided in Rule 3.135(3)(e)(i).

(b)(i) A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addresses as distinct from the general public.



(ii) [*Effective until January 1, 1987. See also amended text following this paragraph.*] Any advertisement that lists areas of an attorney's practice must state in the advertisement:

"Kentucky law does not certify specialties of legal practice."

(ii) [*Effective January 1, 1987. See also former text preceding this paragraph.*] Any advertisement or mailing authorized and approved by this Commission that lists or suggests areas of an attorney's practice must state in print of equal size and character to the print listing or suggesting the areas of an attorney's practice the following:

"This is an advertisement. Kentucky law does not certify specialties of legal practice."

(iii) An attorney who advertises a fee for routine services and accepts the employment must perform such services for the amount advertised, and a statement to that effect shall be included in every advertisement in which a fee is listed. In addition a detailed definition of what services are included in the "routine services" must be supplied to the Commission and to each prospective client for those serivces. If Court costs are generally incurred to perform such routine services, then the advertisement shall state "plus court costs" followed by the amount of the costs which are routinely incurred.

**(6) Approval of Advertisements.** No attorney may advertise unless he complies with either Rule 3.135(6)(a) or (b).

(a) (i) An attorney may employ the following in an advertisement.

1. Name, including name of law firm and names of professional associates, addresses and telephone numbers;

2. One or more fields of law in which the lawyer or law firm practices, or a statement that practice is limited to one or more fields of law, to the extent authorized under Rule 3.135(5)(b)(ii);

3. Date and place of birth;

4. Date and place of admission to the bar of state and federal courts;

5. Schools attended, with dates of graduation, degrees and other scholastic distinctions;

6. Public or quasi-public offices;

7. Military services;

8. Legal authorships;

9. Legal teaching positions;

10. Memberships, offices, and committee assignments, in bar associations;

11. Membership and offices in legal fraternities and legal societies;

12. Technical and professional licenses;

13. Memberships in scientific, technical and professional associations and societies;

14. Foreign language ability;

15. Names and addresses of bank references;

16. With their written consent, name of clients regularly represented;

17. Prepaid or group legal services programs in which the lawyer participates;

18. Whether credit cards or other credit arrangements are accepted.

19. Office and telephone answering service hours;

20. Fee for an initial consultation;

21. Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;



22. Contingent fee rates provided that the statement discloses whether percentages are computed before or after deduction of court costs and case expenses;

23. Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;

24. Hourly rate, provided that the statement discloses that the total fee charged will depend on the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

25. Fixed fees for specific legal srvices to the extent authorized under Rule 3.135(5)(b)(iii); or

26. Any other information specified in any regulation adopted by the Commission pursuant to Rule 3.135(3)(e)(i). Any attorney may petition the Commission for the adoption of such a regulation in which case the petition shall be published as provided in Rule 3.135(3)(e)(i).

(ii) Simultaneously with the publication of any advertisement under this subsection, the attorney shall mail to the Commission, c/o the Director of the Kentucky Bar Association a copy of the advertisement, or if by radio or television, a cassette recording of the advertisement plus a typed transcript of the words spoken.

Any advertisement mailed or delivered to an individual addressee or addressees, shall be mailed to the Commission along with a list of all persons or firms or groups to whom it has been sent.

(b) A fair and accurate representation of any advertisement that does not qualify under Rule 3.135(6)(a) shall be delivered to the Commission, c/o the Director at the Director's office, during normal office hours on a work day, no fewer than 30 days before such advertisement is used. In the event the Commission or any member thereof does not issue a notice of proposed disapproval under Rule 3.135(7) by the end of the 30th day following receipt of such advertisement, the advertisement shall be deemed approved.

**(7) Disapproval of Advertisements**

(a) In the event the Commission finds there are reasonable grounds to believe that an advertisement, other than an advertisement which has previously been approved, or has previously been deemed approved under Rule 3.135 (6)(b), does not comply with the requirements of this rule, it shall immediately issue a notice in writing of proposed disapproval setting forth the factual and legal bases for the proposed disapproval. In the notice of proposed disapproval, the Commission shall provide an opportunity for a hearing before one or more of its members or a hearing officer appointed by the Commission and for the filing of a brief. After consideration of any information submitted to it, the Commission shall issue its final decision in writing. It shall be the duty of the Commission to seek informal resolution prior to issuing a formal decision. in arriving at such decision, the Commission shall consider modification of the advertisement or the insertion of a disclaimer before it issues a blanket disapproval decision.



(b) In the event the Commission has issued a notice of proposed disapproval and has further determined that the publication of the advertisement may be contrary to the public interest, it shall notify the attorney whose advertisement is under consideration and the Director of the Association. The Director may upon receiving such notification bring an action in the Supreme Court to restrain or enjoin the advertisement not complying with this rule.

**(8) Appeal**

(a) Any person aggrieved by a notice of proposed disapproval or a final decision of the Commission pursuant to Rule 3.135(7)(a) may appeal to the Board by filing with the Board, c/o the Director, a Statement of Points and Authorities, within 30 days after the date of the notice of proposed disapproval or final decision. Filing shall be made either by deposit in the United States mail, postage prepaid, or by delivery to the Office of the Director. Review by the Board shall be on the record before the Commission, and shall be decided at the Board's next meeting after receipt by the Director of the Points and Authorities.

(b) Any person aggrieved by a decision of the Board may file a notice for the Supreme Court to review the Board's decision within thirty (30) days after the Board's decision is rendered stating reasons for review accompanied by a brief supporting his position on the merits of the case. The Director may file a brief within thirty (30) days thereafter in support of the Board's decision. Thereafter, the Court shall enter such orders or opinions as it deems appropriate on the entire record.

(c) Interlocutory relief from any ruling of the Commission or the Board may be sought in the Supreme Court in accordance with CR 65.09.

**Rule 3.140 Appointment of Inquiry Tribunal**

Annually, between July 1 and July 7 the Chief Justice shall appoint a former justice or former judge of the Court of Justice, a past-president of the Association, and a former chairman of the House to serve as members of an Inquiry Tribunal. One member shall be designated chairman and each shall possess the qualifications and appropriate powers of a circuit judge. The Tribunal may confer at such times as may be necessary to promptly dispose of all complaints referred to it pursuant to Rule 3.170.

**Rule 3.150 Proceedings Not Public; Exceptions**

(1) [*Effective until January 1, 1987. See also amended text following this paragraph.*] Nothing connected with a disciplinary case shall be made public unless so ordered by the Court. Upon request of the Retirement and Removal Commission the director shall make available to the Commission any of its records pertinent to an investigation by the Commission.

(1) [*Effective January 1, 1987. See also former text preceding this paragraph.*] Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the Court:

(a) Upon request of the Retirement and Removal Commission, the Director shall make available to the Commission any of its records pertinent to an investigation by the Commission.

(b) Upon request of the Trustees of the Clients' Security Fund, the Director shall make available to the Trustees any record pertinent to the investigation of an application for relief under consideration by the Trustees and said records shall not be made public by the Trustees unless so ordered by the Court.

(c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the



extent he deems it appropriate consistent with the defense of his case and the practice of his profession.

(d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

(2) The Inquiry Tribunal may refer the name of a member who has a complaint filed against him to the Association's Lawyers Helping Lawyers Committee for possible assistance to the member without reference to the source or subject matter of the complaint, provided such referral will not delay the disposition of the complaint under these Rules.

[*Pub. Note: By order entered April 27, 1981, the Supreme Court of Kentucky directed that, effective July 1, 1981, excepting those proceedings in which this Court determines either that a private reprimand or that no administrative action whatsoever is proper and which therefore must remain confidential, in such other matters considered by this Court under SCR 3.370 and SCR 4.290 which by SCR 3.150 and SCR 4.130 are to be kept confidential until otherwise ordered by this Court, the entire record in the proceeding shall be considered public at such time as this Court's opinion becomes final under CR 76.30*]

**Rule 3.160 Initiation of Disciplinary Cases**

(1) Any complaint against an attorney for unprofessional conduct shall be reduced to a sworn written statement and shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(2) Notwithstanding the provisions of paragraph (1), when it comes to the attention of the tribunal from any source that an attorney may have engaged in unprofes-

sional conduct, the tribunal may initiate and conduct an investigation, and if it believes from its investigation that there is sufficient evidence to justify its filing a complaint against the attorney it may file such a complaint.

(3) Notwithstanding the provisions of paragraph (1), if the Director deems any written complaint against a member frivolous on its face, he may submit it to the chairman of the Inquiry Tribunal who may decline, without investigation, to entertain it and may authorize the Director to return the complaint to the complaining party with a letter of explanation.

(4) Neither the Kentucky Bar Association nor its officers, agents, delegates or members shall be liable to any member of the bar nor to any other person charged or investigated by said association, its officers, agents or delegates, for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.

**Rule 3.165 Temporary Suspension by the Supreme Court**

On petition of the Inquiry Tribunal, authorized by its Chairman, and supported by an affidavit, an attorney may be temporarily suspended from the practice of law by order of the Court provided:

A. It appears that reasonable cause exists to believe that an attorney is or has been misappropriating funds he holds for others to his own use or has been otherwise improperly dealing with said funds and reasonable cause exists to believe that unless such an order is issued, a real and present danger exists to the public.

Any such order of temporary probation or suspension which restricts the attorney in dealing with said funds shall, when served on any bank maintaining any account upon which said attorney may make withdrawals, serve as an injunction to prevent said bank from making further payment from such account or accounts on any obligation



except in accordance with restrictions imposed by the court, and shall direct such bank not to disclose (except to those entitled to withdraw from the account or accounts or to receive payment of such obligation, or upon the express written permission of at least one of such persons as to each such account or obligation) that such order has been received or the contents thereof. Any fees tendered to such attorney thereafter shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the court. The court may appoint a trustee to receive, transfer, or disburse any funds that are in the possession or are under the control of the attorney if the funds came into the attorney's possession from the attorney's clients or from third parties in the course of the practice of law. The court may require the trustee to render an accounting of said funds to the court and to furnish a copy of the accounting to the director; or

B. An attorney has been convicted of a crime as set out in Rule 3.320 and it appears from the record of such conviction that he has so acted as to put in grave issue whether he has the moral fitness to continue to practice law; or

C. It appears that reasonable cause exists to believe that an attorney is mentally disabled or is addicted to intoxicants or drugs and reasonable cause exists to believe he does not have the physical or mental fitness to continue to practice law. If the attorney denies that he is mentally disabled or denies that he is addicted to intoxicants or drugs, the court may order the attorney to submit to a physical or mental examination by a physician appointed by the court. The examining physician shall file with the clerk of the court a detailed written report setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. The clerk of the court shall furnish a copy of the examining physician's entire report

to the attorney and to the director. The court may order the attorney to produce to the court and to the director any relevant medical or psychiatric records evidencing prior or ongoing treatment for mental disability or addiction to drugs.

The court may enter an order of temporary suspension after the issuance of an order against the attorney to show cause returnable within a period of time prescribed by the court. This court may impose temporary conditions of probation on said attorney or temporarily suspend said attorney or both.

The attorney may for good cause request dissolution or amendment of any such temporary order by petition filed with the court, a copy of which will be served on the director. The court may refer such petition for dissolution to a person who possesses the qualifications of a trial commissioner under Rule 3.230 sitting as a special commissioner for immediate hearing. The special commissioner shall hear such petition forthwith and submit his report and recommendations to the court with utmost speed consistent with due process. Upon receipt of the foregoing report, the court may modify its order if deemed appropriate until final disposition of all pending disciplinary charges against said attorney.

Within twenty (20) days from the date of the entry of the order of temporary suspension, the attorney shall notify all clients in writing of his inability to continue to represent them and shall furnish copies of all such letters of notice to the director.

**Rule 3.170 Processing Disciplinary Cases**

Upon the expiration of fifteen days, or receipt of response, the Director shall refer the matter together with such investigative evidence as may have been obtained, to



the Tribunal to determine whether the complaint should be dismissed or file a charge.

**Rule 3.180 Investigations and Trials to Be Prompt; Subpoena Power**

(1) All investigations and the trial of all disciplinary cases shall be begun, prosecuted and completed as promptly as the ends of justice will permit. Neither the unwillingness of the complainant to prosecute, nor an offer of settlement, compromise or restitution shall delay the investigation, trial or report to the Board.

(2) Proceedings may be deferred by the Tribunal if there is pending civil or criminal or (sic) litigation directly involving the Respondent or proposed Respondent involving substantially similar material allegations to that or those in the disciplinary proceedings, provided, however, that the respondent-attorney proceeds with reasonable dispatch to insure the prompt disposition of the pending litigation.

(3) Upon application of the Director to the Tribunal and after a hearing of which respondent is given at least five days' notice, for good cause shown the Tribunal may authorize the Director to issue a subpoena to a respondent, or any other person or legal entity to produce to the Director any evidence deemed by the Tribunal to be material to the investigation of a complaint. The person or entity so subpoenaed will not divulge, except to his own attorney, that such a subpoena has been served nor what evidence is sought or obtained. The respondent may be present at the time the evidence or material is examined or obtained by the Director and will be furnished copies of all documents obtained.

**Rule 3.185 Informal Admonitory Procedure**

After a complaint against an attorney for unprofessional conduct is investigated and a response filed, the Tri-

bunal may direct a private admonition to the attorney where the acts or course of conduct complained of are shown to be of a minor ethical or technical nature. The attorney so admonished may, within 20 days from the date of the admonition, answer and request that the complaint be treated as if a charge had been filed against him as is provided by RCA (sic) 3.190; whereupon the issues shall be processed under the applicable rules.

**Rule 3.190 Charges; Form; By Whom and Where Filed**

If the Tribunal determines, by a majority vote, that a charge should be filed, it shall prepare such charge stating the name and present, or last known, address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by a member of the Tribunal and filed in the office of the Director.

**Rule 3.200 Notice of Filing Charges; Time to Answer**

Upon the filing of a charge, the Director shall furnish the respondent with a copy by certified mail, return receipt requested, to his last known address, and if none is known subsequent thereto, to his last known bar roster address, and notify him that he must within twenty (20) days after receipt of the notice file his answer and three (3) copies with the Director for transmittal to the Inquiry Tribunal.

**Rule 3.210 Processing Cases of Default, Pleas of Guilt or Answers Raising Only Issues of Law**

(1) If no answer is filed after a Respondent is notified, or an answer is filed admitting the charge, or, the answer raises only issues of law, the Tribunal shall order the record, together with such investigative evidence as may have been obtained to be submitted to the Board. If the answer raises issues of law, the Chairman of the House shall be notified by the Tribunal and he shall appoint counsel for



the Association to file a brief within twenty days and the Respondent may file a brief within twenty days thereafter. After briefs are filed, or the time within which briefs may be filed has expired, the record and briefs shall be forwarded to the President for assignment to a member of the Board for a report.

(2) The Board, by a vote of a majority of the Board present and voting, may remand the entire record to the Chairman of the House of Delegates for an evidentiary hearing on points specified in the Order of Remand. Upon such remand, the Chairman shall follow the procedure which appoints a trial commissioner as provided in Rule 3.230 et seq.

**Rule 3.220 When Charge Shall Not Be Taken as Confessed**

No charge against a respondent shall be taken as confessed when the respondent shall have been constructively summoned under Rule 3.270, unless the report of the Respondent's appointed counsel states that he has caused the respondent to be notified of the nature and pendency of the charge.

**Rule 3.230 Procedure When Answer Raises Issues of Fact**

[*Effective until January 1, 1987. See also amended text following this paragraph.*] If the answer raises any issue of fact the Inquiry Tribunal shall notify the Chairman in order that he may appoint an attorney to represent the Association and a Trial Commissioner, a member of the House possessing the qualifications of a circuit judge and be so commissioned by the Chief Justice. The Trial Commissioner shall reside in a different Supreme Court district from that of the respondent. The Director shall immedi-

ately notify him of his appointment and furnish him with a copy of the pleadings.

[*Effective January 1, 1987. See also former text preceding this paragraph.*] If the answer raises any issue of fact, the Inquiry Tribunal shall notify the Chairman of the House in order that he may appoint an attorney to represent the Association, and appoint a member of the House to act as Trial Commissioner who will be so commissioned by the Chief Justice. The Trial Commissioner shall have been admitted to practice law for a minimum of five (5) years and shall reside in a different Supreme Court District from that of the respondent. The Director shall immediately notify the Trial Commissioner of his appointment and provide him with a copy of the pleadings.

**Rule 3.240 Notice of Appointment of Trial Commissioner and Hearing**

(1) Upon the appointment of a Trial Commissioner the Director shall notify the parties of his name and address. The Trial Commissioner shall fix the time and place of the hearing and the Director shall give notice thereof to the parties. Such hearing shall be not less than twenty (20) days after the date of the notice.

(2) The Trial Commissioner may convene a pretrial conference which shall demand the appearance of counsel representing the respective parties.

**Rule 3.250 Challenge to Qualifications of Trial Commissioner**

Any time, not later than ten (10) days before the date set for hearing the respondent may, by motion, challenge for cause the Trial Commissioner. If the challenge is such as might disqualify a circuit judge, the Chairman of the House shall relieve the challenged member and immediately fill the vacancy.



**Rule 3.260 Joinder and Consolidation**

(1) Any number of acts or omissions, and any number of separate and distinct transactions, alleged to constitute unprofessional conduct on the part of an attorney may be alleged in a single charge in separate counts. Separate charges may, by order of the Tribunal be consolidated and tried as a single disciplinary case.

(2) A charge may be filed against two or more attorneys if based on the same or related state of facts and separate charges against two or more attorneys based upon the same or related state of facts may, by order of the Tribunal, be consolidated and tried as a single disciplinary proceeding. Where two or more attorneys are proceeded against in the same proceeding the Trial Commissioner shall make a separate report to the Board as to each.

**Rule 3.270 Absent Respondents; Appointment of Attorney**

If the copy of the charge and notification, mailed to the respondent as required by Rule 3.200, is undelivered and returned to the Director, the Chairman shall, by order, appoint an attorney for the respondent. The Director shall furnish such attorney copies of the order appointing him to represent the respondent, the charge, and the notification. It shall be the duty of an attorney so appointed to exercise reasonable diligence to notify the respondent personally or by mail of the nature and pendency of the charge against him. Not less than thirty days nor more than fifty days after his appointment, the attorney appointed for the respondent shall file a report stating what efforts he has made to locate and notify the respondent and whether the respondent has been apprised of the charge. If the report of the appointed attorney states that he has caused the respondent to be notified of the nature and pendency of the charge, no further duty shall be required of the attorney. If the report does not so state, it shall be the further duty

of the appointed attorney to attend the hearing before the Trial Commissioner and thereat to represent the respondent, (sic) however, he shall not be required to make a factual investigation of the charge. A respondent for whom an attorney is appointed, as herein provided, shall be deemed to have been constructively summoned on the thirtieth day after the date of the order appointing his attorney. He may file an answer within twenty days after the date on which he shall have been deemed to have been constructively summoned.

**Rule 3.280 Pleadings and Preliminary Motions**

There shall be a charge and answer and, when permitted by the Trial Commissioner, a reply and such amendments to pleadings as may be required to serve the ends of justice. Averments in an answer or a response shall be taken as denied or avoided. No preliminary motions may be filed except:

(a) For a more definite statement of the charge or answer.

(b) Challenging the qualifications of the Trial Committee as provided by Rule 3.250.

**Rule 3.290 Filing and Processing of Pleadings and Other Papers**

Promptly after a charge is filed all further pleadings, notices, motions, orders, and briefs shall be sent to the Director, who shall file the original and forward one copy to the Trial Commissioner and counsel of record. All other reports, inquiries, letters, letters of transmittal, and other communications shall be sent to, and processed by the Director. No such paper or copy thereof shall be sent by, or on behalf of any party to the Court, the Board, the Trial Commissioner, Tribunal, or any member thereof.



**Rule 3.300 Rights of Respondent Against Whom a Charge Has Been Filed**

The respondent against whom a charge has been filed shall have the right to be represented by counsel. If the Tribunal finds the answer to the charge raises issues of fact, the respondent shall be entitled to a hearing before a Trial Commissioner. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Commissioner. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

**Rule 3.320 Procedure Where an Attorney Has Been Convicted of a Misdemeanor or a Felony**

When any member of the Association has been convicted of a felony or class "A" misdemeanor a copy of the judgment shall be filed with the Director for action under Rule 3.160. The Director shall submit copies of the judgment to the Tribunal who may take action under Rule 3.165.

**Rule 3.330 Order of Proceedings and Burden of Proof**

The Trial Commissioner shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Commissioner the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary pro-

ceeding and the facts must be proven by substantial evidence. In reinstatement hearings the burden shall rest upon the applicant. Before submission the Trial Commissioner may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose.

**Rule 3.340 Introduction and Admissibility of Evidence, Evidence Taken in Other Proceedings**

The testimony at all hearings shall be in person, except that the parties may use depositions under the same standards as those prescribed by the Kentucky Rules of Civil Procedure. The rules of evidence applicable in civil actions shall apply.

Where, in any proceeding, evidence has been taken under oath upon due notice to the Respondent, and at the taking of which Respondent has appeared, either in person or by counsel, or as attorney for any party, a duly certified transcript of all, or the essential portions, of such proceedings may be used as evidence in any hearing or in any investigation antecedent to or in connection with any disciplinary case involving the same charge or any charge growing out of matters connected therewith, and such transcript and record, or parts thereof, may be made a part of the record on any hearing or investigation.

**Rule 3.350 Transcript of Evidence**

The proceedings before the Trial Commissioner shall be reported by a reporter appointed by the Trial Commissioner.

**Rule 3.360 Trial Commissioner to File Report With Board**

[*Effective until January 1, 1987. See also amended text following this Rule.*] When a disciplinary proceeding has been finally submitted, the Trial Commissioner shall promptly file with the Board within thirty (30) days after



the transcript of evidence is filed by the reporter with the Director the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed and a written report in the nature of findings of fact relating to guilt or innocence, which shall contain a concise statement of:

(a) the charges made against and the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Commissioner deems proven by substantial evidence.

The Trial Commissioner's report shall constitute a part of the record in the case. The report shall be advisory. Within forty (40) days after the filing of the report with the Director, each party shall file a brief simultaneously with the Director and no reply briefs shall be permitted.

[*Effective January 1, 1987. See also former text preceding this paragraph.*] When a disciplinary proceeding has been finally submitted, the Trial Commissioner shall promptly file with the Board within thirty (30) days after the transcript of evidence is filed by the reporter with the Director, the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed, and a written report in the nature of findings of fact relating to guilt or innocence, which shall contain a concise statement of:

(a) the charges made against the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Commissioner deems proved by substantial evidence.

The Trial Commissioner's report shall constitute a part of the record in the case. The report shall be advisory. Within forty (40) days after the filing of the report with

the Director, each party shall file a brief simultaneously with the Director and no reply briefs shall be permitted.

Upon receipt of the transcript and the Trial Commissioner's report, and the expiration of the forty (40) days briefing time, the matter shall be scheduled for consideration by the Board. Oral argument shall be had before the Board by request filed with the Director by any party no less than twenty (20) days prior to the scheduled consideration of the matter by the Board, or may be scheduled by the Board on its own motion.

**Rule 3.370 Board's Action on Trial Commissioner's Report and Procedure in the Court**

(1) Upon receipt of the report of the Trial Commissioner, the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice-President and the fourteen duly elected members of the Board from their respective Supreme Court districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge shall be disqualified; and the Chief Justice shall appoint a member to consider and act on the case.

(2) Nine of those qualified to sit in disciplinary matter must be present to constitute a quorum for consideration of such matters.

(3) [*Effective until January 1, 1987. See also amended text following this paragraph.*] The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the Board shall then decide by a roll call vote, the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or ¾ of the members of the Board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the Board's minutes and in a written decision of the Board giving its findings of fact and conclusions of law and reasons therefor as stated in paragraph (4) to this Rule. The President shall sign and file with the Director an order setting forth the action and decision of the Board, and the Director shall mail copies of such order and decision together with a copy of the Trial Commissioner's report, to the respondent and his counsel and to each member of the Tribunal.



(3) [*Effective January 1, 1987. See also former text preceding this paragraph.*] The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the Board shall then decide, by a roll call vote, the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or ¾ of the members of the Board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the Board's minutes and in a written decision of the Board giving its findings of fact and conclusions of law and reasons therefor as stated in paragraph (4) to this Rule. The President shall sign and file with the Director an order setting forth the action and decision of the Board, and the Director shall mail copies of such order and decision, together with a copy of the Trial Commissioner's report, to the respondent and his counsel and to each member of the Tribunal. The Board, by a vote of a majority of the Board present and voting, may remand the case to the Trial Commissioner for clarification of the Trial Commissioner's report or for an evidentiary hearing on points specified in the order of remand. The Board may order the parties to file additional briefs on specific issues.

(4) The Board will, in its decision, state wherein it differs with the findings of fact of the Trial Commissioner, and will state the degree of discipline, if any.

(5) The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to, and in the conduct of, the proceedings, shall be filed with the Clerk by the Director.

(6) The respondent may file a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The Director may file a brief within thirty (30) days thereafter in support of the Board's decision. Before the notice for review can be filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceeding including those certified under Rule 3.370. If he files his response in *forma pauperis*, no bond shall be required.

(7) The Court may within sixty (60) days of the filing of the Board's decision notify both the Director and respondent that it will review the Board's decision. If the Court so acts, the Director and respondent may each file briefs within forty (40) days with no right to file reply briefs unless by order of the Court whereupon the case shall stand submitted. Thereafter, the Court shall enter such orders or opinion as it deems appropriate on the entire record.

(8) If the respondent does not file a notice of review or the Court does not notify the parties of its review under paragraph (7) of this Rule, the Court shall enter an order adopting the decision of the Board relating to all matters.

(9) When the respondent is proceeded against by warning order, the notice in paragraph (3) and paragraph (7)



of this Rule shall be deemed to have been served thirty (30) days after the date of the making of the warning order.

(10) In each case to be presented to the Board there shall be supplied with the Director's file a sealed envelope containing a statement of all orders of unprofessional conduct, years of membership in the association, and withdrawals from the association and reasons therefor, of the respondent. Same will be opened only if the Board votes to recommend a finding of guilty, and may be considered in deciding what discipline to recommend. Such statement will become part of the record of the case and be transmitted with the rest of the file to the Supreme Court. Prior to the submission of a case to the Board a copy of said statement will be sent to the respondent, who may review documents relative to it at the Bar Center and may comment upon and point out errors contained in the statement.

**Rule 3.380 Degrees of Discipline**

Upon findings of guilt or unprofessional conduct, discipline may be administered by way of admonition, private reprimand, public reprimand, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or his attorney, and to the attorney for the complainant, and the Court shall order the record sealed subject to reopening only on order of the Court.

**Rule 3.390 Notice to Client of Suspension or Disbarment**

[*Effective until January 1, 1987. See also amended text following this Rule.*] There shall be contained in every opinion or order imposing disbarment or a suspension of more than two (2) months a direction that such suspended or disbarred attorney notify all clients for whom he is actively involved in litigation and similar legal matters of his inability to continue to represent them, and of the

necessity and urgency of promptly retaining new counsel. Such notification shall be by letter duly placed in the United States mail within ten (10) days of the date the order of suspension or disbarment becomes effective, and such suspended or disbarred attorney shall retain carbon copies of all such letters for inspection by duly authorized agents of the Court or the Association.

Failure to do so shall subject the respondent to a charge of contempt of Court.

[*Effective January 1, 1987. See also former text preceding this paragraph.*] There shall be contained in every opinion or order imposing disbarment or a suspension of more than two (2) months a direction that such suspended or disbarred attorney notify all c[illegible]n which he has matters pending and all clients for whom he is actively involved in litigation and similar legal matters of his inability to continue to represent them, and of the necessity and urgency of promptly retaining new counsel. Such notification shall be by letter duly placed in the United States mail within ten (10) days of the date the order of suspension or disbarment becomes effective, and such suspended or disbarred attorney shall simultaneously provide a copy of all such letters to the Director of the Association.

Failure to do so shall subject the respondent to a charge of contempt of Court.

**Rule 3.395 Appointment of Special Commissioner to Protect Clients' Interests**

(1) When it comes to the attention of the director that: (a) an attorney has been temporarily suspended pursuant to SCR 3.165 and has failed to notify his clients of his suspension as required by Court order; or (b) an attorney has been suspended or disbarred pursuant to SCR 3.370 and has failed to notify his clients of his suspension or disbarment pursuant to SCR 3.390; or (c) an attorney has resigned pursuant to SCR 3.480 and has failed to notify his clients of his resignation as required by Court order; or (d) an attorney dies; or (e) an attorney abandons his law practice or his whereabouts are unknown; and no law partner, personal representative of the deceased attorney's estate or other responsible person capable of conducting the attorney's business affairs is known to exist, the director may petition the Court and the Court for good cause may order the appointment of one or more members of the Association to serve as special commissioners of the Court.



The director shall give notice to the attorney by mailing a copy of the petition to the attorney's last known address, except where the attorney is deceased. Within twenty (20) days after the date on which the director files his petition with the Court, the attorney may file a response to the petition with the Court. The Clerk of the Court shall mail a copy of the Court's order ruling on the petition to the attorney's last known address, to the director and to the special commissioner. The director in his petition may suggest to the Court the names of one or more members of the Association to serve as a special commissioner.

(2) A special commissioner appointed under this rule may be authorized by the Court to take possession of the files and records of an attorney described in subsection (1) above, to make an inventory of the files, to give notice to the attorney's clients of the unavailability or inability of the attorney to continue to represent the clients, to deliver to the clients all papers and other property to which the clients are entitled and to take any other action which the Court deems necessary to protect the interests of the clients.

(3) The special commissioner shall not disclose any information contained in any files which are the subject of an inventory without the consent of the client to whom

such file relates, except as reasonably necessary to carry out the orders of the Court.

(4) The special commissioner shall file a written report with the Court containing a summary and explanation of the actions taken by the special commissioner to fulfill the duties assigned to the special commissioner by the Court. The special commissioner shall mail a copy of the report to the director and to the attorney's last known address.

(5) If the special commissioner takes possession of files of an attorney and the special commissioner is unable after a diligent effort to deliver the files to the clients or to new attorneys representing the clients, the special commissioner may request the Court to enter an order providing for the storage and safekeeping of such files.

(6) The special commissioner shall be entitled to reasonable compensation with the amount to be determined by the Court and to also be reimbursed for necessary expenses actually incurred. In order to receive such compensation or reimbursement of expenses, the special commissioner shall file with the ~~Court a~~ motion containing an itemized list of the time spent on the case, the work performed and receipts for the expenses incurred. The special commissioner's compensation and expenses which are approved by the Court shall be paid by the Association, but any amounts disbursed by the Association to the special commissioner may be assessed as costs against the attorney pursuant to SCR 3.450 if the appointment of the special commissioner arose out of a disciplinary proceeding.

**Rule 3.400 Rehearing by Trial Commissioner**

Rehearing shall not be permitted except for newly discovered evidence so material to the rights of either party as to affect the finding and recommendation which could not have been discovered by the exercise of reasonable diligence and then only if such evidence is first presented



in affidavit form, together with the affidavit of counsel that such evidence could not have been discovered sooner by the exercise of reasonable diligence. After the Trial Commissioner has made his report to the Board, no rehearing shall be permitted by the Trial Commissioner. After the Board has determined the guilt or innocence of the respondent and the discipline to be recommended to the Court, no rehearing shall be permitted by the Board. After the Board has filed its order under Rule 3.370 the Court may remand the case to the Board for such action as the Court may direct.

**Rule 3.420 Attorney General May Represent the Board**

The Attorney General of Kentucky, upon request, shall act as counsel for the Association. In all cases the Board may appoint special counsel.

**Rule 3.430 Duty to File Brief**

If respondent timely files response it shall be supported by a brief and the Board shall have thirty days thereafter to file its brief.

**Rule 3.435 Reciprocal Discipline**

(1) Any attorney subject to the provisions of this Rule shall, upon being subjected to professional disciplinary action in another jurisdiction, promptly inform the Director of such action. Upon being informed that an attorney subject to the provisions of these Rules has been subjected to discipline in another jurisdiction, the Director shall obtain a certified copy of such disciplinary order and the President shall file the same with this court.

(2) Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this State has been disciplined in another jurisdiction, this Court shall forthwith issue a notice directed to the attorney containing:

(a) a copy of said order from the other jurisdiction; and

(b) an order directing that the attorney inform the Court, within twenty (20) days from the service of the notice, of any claim by the attorney predicated upon the grounds set forth in paragraph (4) hereof that the imposition of the identical discipline in this State would be unwarranted and the reasons therefor.

(3) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this State shall be deferred until such stay expires.

(4) Upon the expiration of thirty (30) days from the service of the notice issued pursuant to the provisions of (2) above, this Court shall impose the identical discipline unless respondent proves by substantial evidence:

(a) a lack of jurisdiction or fraud in the out-of-state disciplinary proceeding, or

(b) that misconduct established warrants substantially different discipline in this State.

(5) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this State.

**Rule 3.440 Disposition of Case**

The provisions of the Rules regarding petition for rehearing and issuance of a mandate shall apply. The Clerk shall promptly furnish a copy of the order of disposition to all parties and the Director. Every final order or opinion except those for private reprimand, shall be published as are other opinions of the Court.

**Rule 3.450 Recovery of Costs**

(1) Every final order of the Board or the Court which adjudges the respondent guilty of unprofessional conduct



shall provide for the recovery of all costs, including those certified under Rule 3.370. Immediately upon the effective date of the order the Clerk shall furnish a cost bill to the respondent, and if the bill is not satisfied within ten days thereafter, the Clerk shall issue one or more executions thereon, directed to the sheriffs of the counties in which the respondent and the sureties on his bond reside. So much of the costs collected by the Clerk as represent those incurred by the Board shall be promptly refunded to the Association.

(2) Upon a final order of the dismissal of a complaint, costs may be assessed against the complainant if the Court feels the complaint groundless or made maliciously.

**Rule 3.455 Subpoena Power**

Upon application by the director and for good cause shown a majority of the trustees of the client's security fund of the Association may authorize the director to issue a subpoena to any person or legal entity to produce to the trustees any evidence deemed by the trustees to be material to the investigation of a claim for compensation being considered under the clients' security fund plan of the Association. The director shall mail a copy of the application to the person or legal entity to be subpoenaed and to the attorney whose client has made a claim, who shall have twenty (20) days from the date of the application to file an objection with the trustees. If a timely objection is overruled by the trustees, the person or legal entity making the objection shall have twenty (20) days from the date of the trustees' decision to file an appeal with the board of governors. If an appeal is filed with the board, the director shall have twenty (20) days thereafter to file a response. The board shall consider the appeal at its next regularly scheduled meeting and enter such orders as it deems appropriate. The decision of the board shall be final.

**Rule 3.460 Unauthorized Practices Proceeding**

(1) When it comes to the attention of the Director that any person or entity not having the right to practice law is directly or indirectly practicing law, the Director shall have the authority to cause such investigation to be made concerning the matter as he deems appropriate. The Director shall have the authority to subpoena any person or entity to produce any evidence relevant to the investigation including testimony by deposition pursuant to the Rules of Civil Procedure. Any motion to quash a subpoena shall be filed in and ruled on by the Supreme Court. If the Director determines that any person or entity has been engaged in the unauthorized practice of law, the Director shall send a letter or warning by certified mail, return receipt requested, to the person's or entity's last known address, requesting that the unauthorized practice of law be discontinued. If future violations occur and in the opinion of the Board action should be taken, it shall direct that a motion in the name of the Association for a show cause rule be filed with the Clerk. The Clerk shall docket the motion and issue a rule against the alleged offender to show cause why he should not be held in contempt for unauthorized practice of law. The rule shall be returnable on the 15th day following service. When procedure is by warning order, service shall be deemed to have been made thirty days after the date of making the warning order.

(2) If the respondent fails to file due response on the rule's return day or files a response admitting the offense, the rule shall forthwith be made absolute, and the Court shall enter such orders as it deems appropriate to deter and punish, which may include injunctive relief.

(3) If the respondent timely files response denying the offense, the Court shall refer the case to a Trial Commissioner appointed under Rule 3.230 sitting as a special commissioner, who shall thereupon hold a hearing at such time



and place as he may fix, at which hearing the Association shall be represented by counsel designated by the Board for that purpose. The parties may obtain compulsory attendance of witnesses and the production of documents as provided in the Civil Rules. The special commissioner, at the conclusion of the hearing, may permit the filing of briefs by the parties, and shall make and submit to the Court written findings of fact and recommendations.

(4) Upon filing of the special commissioner's report, the Court may permit the filing of briefs by the parties or may summarily dispose of the matter and shall enter such order as may be appropriate. The Clerk shall furnish counsel and the Director copies of every order entered under this rule and every such order shall be reported and published as are other opinions of the Court.

(5) If the respondent is adjudged guilty, he shall be liable for all court costs, and the provisions of Civil Rule 73.07 shall apply.

**Rule 3.470 Attorney Aiding Unauthorized Practice**

Any attorney who knowingly aids, assists or abets in any way, form or manner any person or entity in the unauthorized practice of law shall be guilty of unprofessional conduct.

**Rule 3.475 Furnishing Legal Services Pursuant to Group Arrangements**

(1) As used in this Rule, a group means a professional association, trade association, labor union or other nonprofit organization or combination of persons, incorporated or otherwise, whose primary purposes and activities are other than the rendering of legal services. Legal services must be no substantial service rendered by the group but incidental thereto.

(2) Any member of the Association may furnish legal services to a member of a group, as heretofore defined, only

at the request of such group if the arrangement under which the services are provided complies with the following requirements:

(a) Permits any member of the group to engage legal services independently of the arrangement from any attorney of his choice;

(b) The group, its agents or any member thereof does not interfere with or control the performance of the duties of the member of the Association;

(c) The group, its agents or any member thereof does not directly or indirectly derive a profit from or receive any part of the consideration paid to the member of the Association for the rendering of legal services under the arrangement;

(d) No unlicensed person engages in the practice of law under the arrangement;

(e) The recommending, furnishing or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization;

(3) All publicizing and soliciting activities concerning the arrangement, whether initiated by the group or by the participating member, shall be conducted in compliance with SCR 3.135;

(4) The member of the Association representing a member of the group must charge a reasonable fee in charging fees to the group;

(5) A member of the Association agreeing to furnish legal services to the members of a group pursuant to an agreement shall advise the Association thereof within sixty days after entering into such agreement. Thereafter he shall advise the Association, on forms provided by it, of the following matters: the name of the group, its address, whether it is incorporated, its primary purposes and activities, the number of its members and a description of the types of legal services offered pursuant to the arrangement.



Annually on January 31, he shall report to the Association, on forms provided by it, any changes in such matters, and the number of members of the group to whom legal services were rendered during the calendar year. Each report filed pursuant hereto and the information contained therein, except the name and address of the group, the fact that it has an arrangement for the provision of legal services and the names of members of the Association providing such services shall be confidential. The word "arrangement" as used in this paragraph means any agreement or understanding whatsoever with groups or any representatives of groups whereby any legal services are to be provided to group members, and all systems or practices of referral whatsoever of group members by or through a group, whether such agreements or understandings or systems or practices of referral be written, oral or tacit.

(6) The group shall file an annual report with the Director which shall include the terms of its legal service plan, its schedule of benefits, its subscription charges, its agreements with members of the Association, the financial results of its legal services activities, and all other information which the Director may require to assure compliance with these Rules.

(7) Nothing herein is intended to supersede the provisions of the American Bar Association's Code of Professional Responsibility as adopted by Rule 3.130.

(8) A violation of any provision of this rule by any member of the Association directly or in concert with another, shall be deemed unprofessional and unethical conduct.

**Rule 3.476 Furnishing Legal Services Pursuant to a Prepaid Legal Services Plan**

As used in this Rule, a prepaid legal services plan means a plan, program or insurance policy under which a member of the Association is paid (in whole or in part) legal fees

or a member of the plan is so reimbursed for legal fees for services rendered to a member of the plan.

A member of the Association may furnish legal services to a member of a prepaid legal services plan, as heretofore defined, provided that the plan complies with the following requirements:

(a) The plan permits the member of the plan to use the services of any member of the Association of his choice; and, no agent, servant or employee of the plan or the plan itself shall recommend to a member of the plan the services of any particular member or members of the Association;

(b) No agent, servant or employee of the plan or the plan itself shall interfere with or control the performance of the duties of the attorney;

(c) No agent, servant or employee of the plan or the plan itself shall derive directly or indirectly a profit from or receive any part of the consideration paid to the attorney for the rendering of legal services under the plan;

(d) No publicizing and soliciting activities concerning the arrangement shall be conducted or carried on, either by the group or by the participating member, except as permitted under SCR 3.135.

(e) The member of the Association representing a member of the plan shall charge a reasonable fee in charging his fee to the member of the plan.

(f) Nothing herein is intended to supersede the provisions of the American Bar Association's Code of Professional Responsibility as adopted by Rule 3.130.

(g) A violation of any provision of this rule by any member of the Association directly or in concert with another, shall be deemed unprofessional and unethical conduct.

**Rule 3.477 Member's Financial Interest in Group or Plan**

Any member of the Association who is actively engaged in the practice of law as defined in Rule 3.020 shall not have



any financial interest whatsoever in any group or plan contemplated within Rule 3.475 or Rule 3.476. Nothing herein shall prevent the Association from forming a corporation to render the services contemplated in Rule 3.476.

**Rule 3.480 Withdrawal From the Assoication**

(1) Any member who desires to withdraw his membership and is not under investigation pursuant to Rule 3.160(2), and does not have a complaint or charge pending against him, shall file a written motion to that effect with the Court and serve a copy on the Registrar. The motion shall be docketed by the Clerk. The Registrar shall, within ten (10) days after the filing of the motion, certify in writing to the Court whether the movant is an active member in good standing of the Association and whether movant is under a disciplinary investigation by the Tribunal or has a complaint or charge pending against him. If movant is an active member in good standing and has no pending disciplinary investigations, complaints, or charges, the motion shall be granted as of course.

(2) Any member who desires to withdraw his membership and is under investigation pursuant to SCR 3.160(2) or has a complaint or charge pending against him shall file a written motion to that effect with the Court and serve a copy on the Registrar. The motion shall be docketed by the Clerk. The Registrar shall within ten (10) days submit to the Court any active disciplinary files maintained by the Tribunal or Director relating to movant. The Court may direct the Director to conduct any further investigation required to permit the Court to determine whether movant has engaged in unethical or unprofessional conduct. If the movant has not been engaged in such conduct, the motion shall be granted as of course. If the movant has been engaged in such conduct, the motion will be de-

nied and he may comply with paragraph (3) of this Rule 3.480.

(3) Any member who has been engaged in unethical or unprofessional conduct and desires to withdraw his membership shall file a verified motion with the Court stating as follows:

(a) He will seek reinstatement only after a stated period of time only under the provisions of Rule 3.510 or Rule 3.520, whichever is applicable, and under the provisions of the Rules in effect at the time of the filing of an application for reinstatement.

(b) He will not practice law in the Commonwealth of Kentucky subsequent to his suspension or disbarment unless or until he is reinstated as a member of the Association by order of the Court.

(c) He will pay all costs of the disciplinary investigation and proceedings in accordance with Rule 3.450.

(d) He will comply with the provisions of Rule 3.390 regarding notice to clients of suspension or disbarment.

The motion shall be served on the Registrar and docketed by the Clerk. The Registrar shall within ten (10) days after the filing of the motion submit to the Court any active disciplinary files maintained by the Tribunal or Director relating to movant, and any response to the motion deemed appropriate by the Registrar. The Court will then enter an appropriate order stating the conditions under which the motion is granted or deny the motion and direct the completion of disciplinary proceedings under these Rules.

**Rule 3.500 Restoration to Membership**

(1) Any former member who has retired under Rule 3.480, or who has been suspended for failure to pay dues as provided by Rule 3.050, or any member who has failed to pay dues for such period of time as to warrant suspen-



sion under that Rule, or any member who has been suspended for failure to comply with the continuing legal education requirements as provided by Rule 3.669, and such status had prevailed for less than a period of five (5) years may apply for restoration by completing forms provided by the Director, tendering a fee of $150.00, and payment of dues for the current year and all back years, unless he has been in a retired status by order of the Court.

Upon receipt of such application and payments, the Clerk shall tender the same to the Director who shall refer the application to the Commission for proceeding under Rule 3.667. The Commission shall make its recommendation which shall be added to the record in the restoration proceeding. The Director shall in turn advise each member of the Board and furnish them all pertinent information available.

(a) The Board shall, upon review of the information, make its recommendation to the Court for approval and entry of an order restoring the applicant or

(b) refer the matter to the Committee for proceedings under Rule 2.040. The Committee's recommendations shall be made to the Board for its action and recommendation to the Court.

(2) Any former member who has withdrawn or retired or has been suspended for failure to pay dues or has been suspended for failure to meet continuing legal education requirements, and such status has prevailed for five (5) or more years, may file an application for restoration and pay a fee of $250.00. If the former member has been suspended for the nonpayment of bar dues he shall tender payment for current dues and all back dues. The application shall then be referred to the Committee for proceedings under Rule 2.040, and to the Commission for proceedings under Rule 3.667.

The Committee and Commission shall make their recommendations to the Board.

(3) If the Committee recommends approval of the application and the Board concurs, then the application shall be referred to the Board of Bar Examiners, which Board shall administer, at the time of the regular Bar Examinations, a written examination confined to the subjects of Procedure and Ethics. The fees required by Rule 2.020 shall be paid prior to taking the examination.

If an applicant passes an examination, such fact shall be certified to the Court together with a recommendation that the applicant be readmitted to membership. If the applicant fails to pass an examination, the Board of Bar Examiners shall certify that fact of failure to the Association and the Court for entry of an order denying the application for reinstatement.

The provisions of Rule 2.090 shall apply where not inconsistent.

(4) If the Committee recommends disapproval of the application, then the information shall be referred to the Board for review. The applicant shall be promptly notified of such disapproval and, if he so requests, the Board shall appoint a Trial Commissioner to conduct a hearing and make recommendation to the Board. If after such hearing the Board concurs in disapproval of the application, its findings and recommendation shall be filed with the Clerk and then the applicant shall be notified of this decision by the Clerk by certified mail, return receipt requested, at his last known address.

For a period of twenty (20) days after the Clerk shall have mailed said notice, the applicant may petition the Court for a review of the action of the Board.

Should the Board or the Court reverse the recommendations of the Committee, then the file shall be referred to



the Board of Bar Examiners for procedure under paragraph (3).

(5) All costs incurred in excess of the filing fee shall be paid by the applicant. A bond to secure costs to be incurred shall be posted with the Clerk before the Clerk files the application.

(6) The burden of proof is on the applicant to establish his present qualifications to practice law in Kentucky.

**Rule 3.510 Reinstatement in Case of Disciplinary Suspension**

(1) No former member of the Association who has been suspended for a disciplinary cause shall resume practice until he shall have been reinstated by order of the Court. Application for reinstatement shall be on forms provided by the Director and Commission and filed with the Clerk and shall be accompanied by a filing fee of $500,00, $250.00 of which shall be made payable to the Kentucky Bar Association and $250.00 of which shall be made payable to the Kentucky Board of Bar Examiners. The Clerk shall not accept for filing an application unless all costs incurred in the suspension proceeding have been paid by the former member and the costs in the reinstatement proceeding (whether costs of the Association or of the Character and Fitness Committee or of the Board of Bar Examiners) secured by the posting of bond. Upon filing of an application and payment of the filing fee the Clerk shall promptly deliver the application to the Director, together with the original record in the suspension proceeding, which shall become a part of the record in the reinstatement proceeding. The Director shall refer the application to the Commission for proceedings under Rule 3.667. The Commission shall make its recommendation which shall be added to the record in the reinstatement proceeding.

(2) If the period of suspension has prevailed for less than one (1) year the Tribunal shall promptly cause an investigation to be made to determine whether the applicant has complied with the Court's order of suspension, whether he presently possesses sufficient professional capabilities and qualifications properly to serve the public as an active practitioner, and whether he is of good moral character. A report of the factual findings of the investigation shall be filed with the Tribunal. If the period of suspension has prevailed for one (1) year or more, the matter shall be referred to the Character and Fitness Committee for proceedings under Rule 2.040. The Committee shall file a written report and recommendation with the Tribunal.

If the Tribunal determines that the application should be approved, the Tribunal shall file with the Clerk the entire record, including, a written report and recommendation by the Tribunal. The Court may accept the Tribunal's recommendation and enter an order reinstating the applicant to the practice of law or deny the application.

If the Tribunal determines that the application should not be approved, it shall be processed in accordance with Rule 3.230 and other applicable disciplinary rules then in effect.

(3) If the period of suspension has prevailed for more than five (5) years, the Director shall refer the application to the Character and Fitness Committee for proceedings under Rule 2.040. The Committee shall file a written report and recommendation with the Tribunal. If the Committee recommends approval of the application and the Tribunal concurs, the Tribunal shall refer the application to the Board of Bar Examiners for processing in accordance with Rule 3.500(3) and shall file the entire record with the Clerk, including the written report and recommendation of the Tribunal. The Board of Bar Examiners



shall certify the results of the examination to the Director and the Court. If the applicant successfully completes the examination, the Court may at its discretion enter an order reinstating him to the practice of law. However, if the applicant fails to pass the examination, the Court shall enter an order denying the application.

If the Tribunal recommends disapproval of the application, the case shall be processed in accordance with Rule 3.230 and other applicable disciplinary rules then in effect.

If the Board recommends approval of the application to the Court pursuant to Rule 3.370 and the Court concurs, the Court shall refer the application to the Board of Bar Examiners for processing under the provisions of Rule 3.500(3). The Board of Bar Examiners shall certify the results to the Director and the Court. If the applicant successfully completes the examination, the Court may at its discretion enter an order reinstating him to the practice of law. If the applicant fails to pass the examination, the Court shall enter an order denying the application. However, if the Board recommends disapproval of the application to the Court pursuant to Rule 3.370 and the Court concurs, the Court shall enter an order denying the application.

(4) If the former member desires to resume practice at the end of his suspension, the application must be filed a sufficient length of time in advance thereof to permit investigation of the applicant by the Association.

**Rule 3.520 Reinstatement in Case of Disbarment**

(1) Any former member who has been disbarred may apply for reinstatement after a period of five (5) years. The application shall be on forms provided by the Director and Commission and filed with the Clerk and shall be accompanied by a fee of $500.00, $250.00 of which shall be made payable to the Kentucky Bar Association and $250.00 of

which shall be made payable to the Kentucky Board of Bar Examiners. The Clerk shall not file the application unless all costs incurred in the disbarment proceedings have been paid and the costs in the reinstatement proceeding (whether costs of the Association or of the Character and Fitness Committee or of the Board of Bar Examiners) secured by posting of a bond. Upon filing of the application and fee, the Clerk shall tender the application to the Director and deliver to him the original record in the disbarment proceedings. The Director shall refer the application to the Committee for proceedings under Rule 2.040 and to the Commission for proceedings under Rule 3.667, and make any investigation he deems proper for determining the applicant's compliance with the order of disbarment and his qualifications to be reinstated. The Committee and Commission shall make their recommendations to the Board, and the Chairman shall appoint counsel to represent the Association. The filing of briefs and the procedure thereafter shall be in accordance with the applicable Rules then in effect pertaining to disciplinary proceedings.

If the Board, after considering the report of the Trial Commissioner, recommends reinstatement, the application will thereupon be referred to the Board of Bar Examiners for processing under Rule 3.500(3) or under such comparable rule or rules as may then be in effect, and upon favorable report by the Board of Bar Examiners the recommendation of reinstatement shall be made to the Court.

If the Board recommends against reinstatement, the applicant may petition the Court for a review within twenty (20) days after the Clerk shall have mailed a copy of such recommendation. The Director shall have twenty (20) days thereafter in which to file a brief on behalf of the Board. Should the Court approve reinstatement over the adverse recommendation of the Board, the applicant must successfully pass the examination provided



for by Rule 3.500(3), or by such comparable rule as may then be in effect, before being admitted to practice.

The original record in the disbarment proceedings shall become part of the record before the Trial Commissioner and at all stages thereafter. The Board shall promptly consider the Trial Commissioner's report, by the same vote then required by Rule 3.370(3), and make recommendations to the Court.

(2) The Director shall file with the Clerk the entire record, commencing with the original disbarment proceeding, and a certified bill for the costs and expenses of the Board and Trial Commissioner in the proceeding.

(3) When an application for reinstatement has been denied, no application for reinstatement may be filed within three (3) years from the date of the order denying reinstatement.

(4) If the applicant is reinstated, the Clerk shall promptly forward an attested copy of the order of the Court to the circuit clerk of the court in which the applicant's disbarment was noted, whereupon the circuit clerk shall record the attested copy of the order of reinstatement, with the cross-reference to the order of disbarment, and index such recordation. When the order becomes final and all costs, expense and the current year's dues have been paid, the applicant may again practice law.

**Rule 3.530 Advisory Opinions—Informal and Formal**

(1) Any attorney who is in doubt as to the propriety of any professional act contemplated by him or course of conduct or any act of any person or entity which may constitute the unauthorized practice of law, may in writing to the Director petition for an advisory opinion thereon. Local bar associations may similarly petition for advisory opinions. The Director shall transmit the petition to the Committee on Legal Ethics or Committee on Unauthorized Practice. The Committee to whom the petition is referred

shall promptly furnish the petitioner a written informal opinion on the propriety of the act or course of conduct in question, with a copy to the Director.

(2) Upon request of the Committee prior to the furnishing of the informal opinion to the petitioner, the Board may, if it deems the question of sufficient importance, issue and furnish the opinion prepared by the Committee, or as modified by the Board, as a formal opinion of the Board. No formal opinions shall be adopted unless approved by vote of three-fourths of the voting members present at the meeting of the Board. If the Board is unable to adopt a formal opinion, the Committee shall furnish petitioner an informal opinion, with a copy to the Director.

(3) Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act.

(4) All formal opinions of the Board shall be published in full or in synopsis form, as determined by the Director, in the edition of the KENTUCKY BENCH & BAR next issued after the adoption of the opinion.

(5) Any person or entity aggrieved or affected by a formal opinion of the Board may file with the Clerk within thirty (30) days after the end of the month of publication of the KENTUCKY BENCH & BAR in which the full opinion or a synopsis thereof is published, a copy of the opinion, and, upon motion and reasonable notice in writing to the Director, obtain a review of the Board's opinion by the Court. The Court's action thereon shall be final and the Clerk shall furnish copies of the formal order to the original petitioner, the movant and the Director.

(6) The filing fee for docketing a motion under paragraph (5) of the Rule 3.530 shall be as provided by Civil Rule 76.42(1) for original actions in the Supreme Court.

# REPLY BRIEF

Supreme Court, U.S.
FILED
AUG 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-16

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD D. SHAPERO - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

## PETITIONER'S REPLY BRIEF

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No. 87-16

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

---

RICHARD D. SHAPERO - - - - - *Petitioner*

*v.*

KENTUCKY BAR ASSOCIATION - - *Respondent*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

---

## PETITIONER'S REPLY BRIEF

---

### 1. THE PETITION SHOULD BE GRANTED BECAUSE RESPONDENT DOES NOT DISPUTE THAT THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS.

The granting of a petition for writ of certiorari is appropriate "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." U. S. Supreme Court Rule 17.1(b). The Respondent, Kentucky Bar Association (hereafter "the KBA"), does not dispute that the decision below of the Kentucky Supreme Court conflicts with the decisions of two federal courts of appeal and several state courts of last resort, conceding "the lack of uniformity in this area." Respondent's Brief at page 15.

**2. THE PETITION SHOULD BE GRANTED BECAUSE TARGETED DIRECT MAIL ADVERTISING BY ATTORNEYS IMPLICATES IMPORTANT FEDERAL CONSTITUTIONAL RIGHTS.**

The KBA, however, indirectly disputes that the conflicting decisions involve a federal question by its startling argument that the First and Fourteenth Amendments to the United States Constitution are not implicated by the Kentucky Supreme Court's ban on targeted direct mail advertising. The Kentucky Supreme Court's decision, however, is clearly grounded in a considered, though erroneous, analysis of this Court's attorney advertising cases and recognizes that Petitioner Richard D. Shapero's (hereafter "Shapero") First and Fourteenth Amendment rights are in issue. Certainly, if the KBA is correct and attorney advertising of this sort does *not* implicate important First Amendment rights, then this unprecedented departure from established law is in itself an important issue which should be addressed by this Court.

Accordingly, the KBA has presented no rational grounds for denying the Petition and, therefore, it should be granted.[1]

[1]The KBA draws this Court's attention to the fact that there is pending in the United States District Court for the Western District of Kentucky a case in which Shapero alleges that the KBA's enforcement of the Kentucky Supreme Court's new rule prohibiting targeted direct mail advertising violates his constitutional rights. The KBA has failed to mention, however, that it sought dismissal of that action, arguing that the District Court lacks jurisdiction either because the KBA is immune from suit or because of Petitioner's pending Petition for Writ of Certiorari in

*(Footnote Continued on Next Page)*



**3. THE PETITION SHOULD BE GRANTED BECAUSE THE KENTUCKY SUPREME COURT DOES NOT HAVE DISCRETION TO PROHIBIT CONSTITUTIONALLY PROTECTED SPEECH.**

Drawing an ill-defined distinction between *printed* "advertising" and *printed* "solicitation," the KBA boldly argues that the Kentucky Supreme Court's ban on targeted direct mail advertising (or solicitation) is merely a "judgment-call" unfettered by the confines of the First Amendment to the United States Constitution. Respondent's Brief at page 13. The KBA's sole support for this position is this Court's censure in *Ohralik v. Ohio State Bar Ass'n*, 436 U. S. 447, 449-52 (1978), of a lawyer's in-person solicitation of two teenaged accident victims, one of whom was hospitalized. It ignores entirely the subsequent Supreme Court cases rejecting prophylactic restrictions on printed legal advertising on First Amendment grounds, including in particular *Zauderer v. Office of Disciplinary Counsel*, 471 U. S. 626 (1985).

The KBA's denigration of Shapero's proposed letter as solicitation rather than advertising is a semantic difference without a constitutional distinction. But clearly such quibbling is not a permissible basis for evaluating constitutional issues. *See, e.g., James v. Kentucky*, 466 U. S. 341, 348-49 (1984) (by asking for an "admonition" not mandated under state law, a crim-

*(Footnote Continued From Preceding Page)*

this Court. It appears to be the KBA's position, therefore, that the Kentucky Supreme Court's rule prohibiting targeted direct mail advertising is not subject to constitutional review.

inal defendant did not waive his right to a constitutionally-required "instruction").

The KBA is surely aware that this Court has rejected any supposed distinction between "solicitation" and "advertising" as constituting a real basis for judging restrictions on First Amendment rights.

> '[A] State cannot foreclose the exercise of constitutional rights by mere labels.' . . . Regardless of the particular label asserted by the State—*whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'*— a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

*Bigelow v. Virginia,* 421 U. S. 809, 826 (1975) (emphasis added). The death knell for any such distinction was finally and clearly sounded in *Zauderer v. Office of Disciplinary Counsel,* 471 U. S. at 647, when this Court held that "[a]n attorney may not be disciplined for *soliciting* legal business through printed *advertising* containing truthful and nondeceptive information and advice regarding the legal rights of potential clients." (emphasis supplied.)

This Court, however, *has* distinguished between *in-person* solicitation and *print* solicitation when it distinguished the solicitation found protected in *Zauderer* from the un-protected solicitation in *Ohralik.*

> Our decision in Ohralik was largely grounded on the substantial differences between face-to-face solicitation and the advertising we had held permissible in Bates. . . . It is apparent that the concerns that moved the Court in Ohralik are not present here. . . . [A]ppellant's advertisement—and



> print advertising generally—poses much less risk of overreaching or undue influence. . . . Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in Ohralik cannot justify the discipline imposed on appellant for the content of his advertisement.

*Zauderer,* 471 U. S. at 641-43.

Clearly, therefore, there is no rational basis for arguing that a federal constitutional issue is not directly presented here based on some flimsy distinction between "solicitation" and "advertising."

## 4. THE KENTUCKY SUPREME COURT DECIDED THE CASE BELOW ON THE FEDERAL GROUND OF WHETHER PETITIONER'S PROPOSED ADVERTISING WAS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS, AND NOT ON RESPONDENT'S NEWLY-RAISED GROUNDS.

A reason that *could* have provided a basis for the state court's decision may not be advanced to support that decision unless it actually *was* a basis for the state court's decision. *Tacon v. Arizona,* 410 U. S. 351, 352 (1973); *Stroble v. California,* 343 U. S. 181, 193-94 (1951).

### A. The Case Below was Not Decided by the Kentucky Supreme Court Based on a Distinction Between Advertising and Solicitation.

The Kentucky Supreme Court did not distinguish between solicitation and advertising in its decision prohibiting Shapero from mailing his proposed letter to a targeted audience. In fact, that Court recognized that in *Zauderer* this Court "ruled that an attorney may not

be disciplined for *soliciting* legal business through printed newspaper *advertisements* which contained truthful and nondeceptive information and advice regarding the legal rights of potential clients." *Shapero v. Kentucky Bar Ass'n*, 726 S.W.2d 299, 300 (Ky. 1987), Petition at 4a (emphasis added).

**B. The Case Below was Not Decided by the Kentucky Supreme Court Based on the Content of the Proposed Advertisement.**

The Kentucky Supreme Court did not find that Shapero's letter contained or posed any of the particular evils that prompted it to adopt a prophylactic ban on the advertising (or solicitation) method in issue. Instead, the Kentucky Supreme Court acknowledged that the two administrative bodies that had previously considered Shapero's request for permission to mail the proposed letter to a targeted audience "did not find that the letter was false, misleading or deceptive." *Id.*, Petition at 4a-5a.

Now, however, the KBA offers its own, uninvited, and never-before argued opinion that Shapero's proposed letter is "high pressure," "overbearing solicitation" intended to "overwhelm" the "gullible recipient." Respondent's Brief at page 9.[2] Because the letter contains six capitalized and underlined words, the KBA concludes it is not entitled to First Amendment protection: "Letters of solicitation which shout commands to the individual, targeted recipient in words in underscored capitals are of a different order from advertising and are subject to proscription." Respondent's Brief at page 11. Judging Shapero's proposed letter by a novel standard heretofore unknown in Kentucky, the KBA asserts that Shapero's free speech rights are not violated because his letter is "overbearing, coercive and undignified" and "is addressed to potential clients who are emotionally incapable of making a rational decision to accept or reject [his] representation with respect to a legal matter that is not frivolous." Respondent's Brief at pages 12 and 14.

One reason the Kentucky Supreme Court did not adopt this new "overbearing, coercive, or undignified" standard is that Kentucky's legal advertising regulations do not prohibit written advertising that is overbearing, coercive or undignified except to the extent that these "attributes" render the advertisement false, misleading or deceptive.[3] Of course, a more basic rea-

[2] In addition to the fact that the Kentucky Supreme Court did not premise its Opinion on the content of Shapero's letter, the KBA conceded in its Brief before that Court that the letter was *not* of the type it argued was properly prohibited by the rule, i.e., "targeted direct mail advertising to persons in a state of bereavement." Respondent's Brief to the Kentucky Supreme Court at page 6. In fact, the KBA admitted below that while "some lawyers would use

*(Footnote Continued on Next Page)*



*(Footnote Continued From Preceding Page)*

this type of solicitation" if the rule was removed, "[t]his is *not* . . . to suggest that [Shapero] contemplates this type of letter. [Shapero's] sample letter [which is the same letter excoriated here by the KBA] indicated a desire to send a targeted direct mail advertising letter to persons known to have been named a defendant in a foreclosure action." Respondent's Brief to the Kentucky Supreme Court at page 6.

[3] Kentucky's legal advertising regulations have at all relevant times generally prohibited advertising "which is false or tends to

*(Footnote Continued on Next Page)*

son why this standard was not adopted is that none of the advertising decisions rendered by this Court have established "overbearing, coercive or undignified" as a standard for denying First Amendment protections.

Additionally, until now there has been no argument or finding that the potential foreclosure defendants to whom Shapero's proposed letter is addressed are the presumably gullible persons "emotionally incapable of making a rational decision" that the KBA characterizes them to be. The KBA's argument "amount[s] to little more than unsupported assertions: nowhere does the [KBA] cite any evidence or authority of any kind for its contention" that Shapero's targeted audience may potentially be harmed by his letter. *Zauderer,* 471 U.S. at 648.

Consequently, there are no real factual issues relating to the content of Shapero's proposed targeted direct mail advertising that would interfere with this Court's consideration of the purely-legal question of whether blanket prohibition of that method of advertising violates the First and Fourteenth Amendments to the United States Constitution.

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*(Footnote Continued From Preceding Page)*

be misleading, deceptive, or unfair, or which is self-laudatory rather than designed to inform the public." SCR 3.135(4). They have specifically prohibited particular methods and contents of legal advertising believed to violate these proscriptions, including targeted direct mail advertising. SCR 3.135(5).



## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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# JOINT APPENDIX

Supreme Court, U.S.
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No. 87-16

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October Term, 1987

RICHARD D. SHAPERO - - - - Petitioner,

*versus*

KENTUCKY BAR ASSOCIATION - - Respondent

On Writ Of Certiorari To The Supreme Court Of Kentucky

## JOINT APPENDIX

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Certiorari Granted October 5, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

3PP

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 29, 1986—Shapero files motion in Supreme Court of Kentucky for review of Advisory Opinion E-310 of the Board of Governors of the Kentucky Bar Association.

May 5, 1986—Kentucky Bar Association files response stating it has no objections to requested review.

May 8, 1986—Shapero files motion for briefing schedule.

June 5, 1986—Supreme Court of Kentucky grants review, sets briefing time, and schedules oral argument.

July 8, 1986—Shapero files brief in Supreme Court of Kentucky.

August 5, 1986—Kentucky Bar Association files brief in Supreme Court of Kentucky.

August 20, 1986—Shapero files reply brief in Supreme Court of Kentucky.

August 28, 1986—Oral Argument is heard by the Supreme Court of Kentucky.

November 26, 1986—Supreme Court of Kentucky affirms Bar Association's Opinion.

December 16, 1986—Shapero files petition for modification or extension of Opinion.

December 31, 1986—Kentucky Bar Association files response expressing no objection to Shapero's petition.

January 16, 1987—Shapero and Kentucky Bar Association file joint motion to hold Shapero's motion for reconsideration (sic) in abeyance until subsequent motions are filed.

March 12, 1987—Supreme Court of Kentucky denies joint motion to hold in abeyance, and grants petition for modification or extension, deleting page seven of original opinion and substituting new page seven.

March 27, 1987—Supreme Court of Kentucky vacates order of March 12, 1987 (for its failure to serve the Order on the parties), and denies joint motion to hold in abeyance and grants petition for modification.

March 30, 1987—Supreme Court of Kentucky corrects misspelling of Petitioner's name in order of March 27, 1987.

# PETITIONER'S

# BRIEF

Supreme Court, U.S.
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NOV 19 1987
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October Term, 1987

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On Certiorari to the Supreme Court of Kentucky

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

**Whether a state court may employ a blanket prohibition on targeted direct mail advertising by attorneys to ban a specific mailing which has not been found to be false, misleading or deceptive after submission to an advertising review commission.**

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On Certiorari to the Supreme Court of Kentucky

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## BRIEF FOR PETITIONER

---

## CITATION TO OPINIONS BELOW

opinion of the Supreme Court of Kentucky is reported as *Shapero* v. *Kentucky Bar Association*, 726 S. W. 2d 299 (Ky. 1987), and is reproduced in the Appendix to the Petition for a Writ of Certiorari at 1a to 8a.[1] The opinion of the Kentucky Bar Association Ethics and Unauthorized Practice Committee is reported as KBA E-310, 50 Ky. Bench & Bar 32-33 (Winter 1985-86), and is reproduced at 9a - 10a in the Appendix to the Petition for a Writ of Certiorari.

[1]All items included in the Joint Appendix have previously been reproduced in the Appendix to the Petition for Writ of Certiorari. Pursuant to U.S. Supreme Court Rule 30.1, therefore, all references will be to the items as paginated in the Appendix to the Petition for Writ of Certiorari, and will be referred to as "Appendix to Petition at ___."

The Opinion of the Kentucky Attorneys Advertising Commission styled *In re: Application of Richard Shapiro* [sic] and dated September, 1985, is unreported but is reproduced in the Appendix to the Petition for a Writ of Certiorari at 10a - 15a.

## JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on November 26, 1986. A timely petition for modification was granted, and the judgment, as modified, was entered on March 27, 1987. The Petition for Writ of Certiorari was filed in the United States Supreme Court on June 26, 1987. This Court granted the Petition on October 5, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

In 1982 Kentucky adopted SCR 3.135 (1982),[2] which prohibited all targeted direct mail advertising by lawyers:

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons other than a family to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

[2]The entirety of SCR 3.135 (1987) is found in the Appendix to Respondent's Brief in Opposition to the Petition at 30a - 39a.



This rule, which was embodied in a section entitled "Advertisement of Legal Services," remained in effect until March of 1987 when it was deleted by the Kentucky Supreme Court in deciding this case. The Kentucky advertising rule continues to provide that, except for certain routine advertisements which are deemed preapproved under SCR 3.135(6)(a)(i), a Kentucky attorney must submit any proposed advertisement for review to the Kentucky Attorneys Advertising Commission "no fewer than 30 days before such advertisement is used." SCR 3.135(6)(b).

On July 12, 1985, the Petitioner, Richard D. Shapero (hereafter "Shapero"), brought to the attention of the Advertising Commission the recently-decided case of *Zauderer* v. *Office of Disciplinary Counsel,* 471 U. S. 626 (1985), and requested its approval to send a proposed letter "to potential clients who have had a foreclosure suit filed against them." Pages 1 - 2 of Appendix to Petitioner's Brief in the Kentucky Supreme Court. The letter in its entirety stated as follows:

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow

you to keep your home by ORDERING your creditor to STOP and give you more time to pay them.

You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

The Advertising Commission did not find that the letter was false, misleading or deceptive or that it created "a serious risk of overreaching, exercise of undue influence or fraud." Appendix to Petition at 14a - 15a. Nonetheless, it rejected the proposed advertisement, ruling that, on its face, the letter is "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct or from the general public." Appendix to Petition at 11a. However, after careful analysis of *Zauderer* and other pertinent Supreme Court decisions, the Advertising Commission concluded that SCR 3.135(6)(a)(ii) should be deleted in view of the fact that it "require[s] pre-filing of such solicitations so that the Commission has the opportunity to view these solicitations before they are received by the addressee." Appendix to Petition at 13a, 15a.

Subsequently, in order to obtain a final decision of the Kentucky Supreme Court as provided in SCR 3.530(5), Shapero requested an opinion from the Ethics Committee of the Kentucky Bar Association about the



validity of the Kentucky rule banning targeted direct mail solicitations. Like the Advertising Commission, the Ethics Committee did not find Shapero's letter to be false, misleading, deceptive, or overreaching. But, *unlike* the Advertising Commission, the Ethics Committee upheld the ban on targeted direct mail advertising. Appendix to Petition at 9a, 10a.

In April, 1986, Shapero petitioned the Kentucky Supreme Court for review of the Ethics Committee's Opinion. On March 27, 1987, the Kentucky Supreme Court issued an opinion in which it held that "[i]n view of the language of the rule as it is presently written, we are compelled by the decision in *Zauderer* to order the rule deleted." *Shapero,* 726 S. W. 2d at 300, Appendix to Petition at 6a.

Notwithstanding its facial deference to the *Zauderer* decision, the Kentucky Supreme Court limited that case strictly to its facts [describing it as applying to solicitation of "legal business through printed *newspaper* advertisements" (emphasis supplied)] and adopted a new rule of law which it applied retroactively to Shapero's proposed advertisement. 726 S.W. 2d at 300, Appendix to Petition at 4a. The new rule is the American Bar Association's Model Rule 7.3 (hereafter "ABA Rule 7.3") which was approved by the ABA House of Delegates on August 2, 1983. It provides:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship,

> by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

The new rule differs from the old Kentucky rule only in that the prohibition on targeted direct mail advertising is now limited to situations "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."

The Kentucky Supreme Court's decision in which it concluded that ABA Rule 7.3 was constitutionally permissible was particularly notable in five respects:

*First,* the Kentucky Supreme Court relied mainly on one case from this Court dealing with attorney advertising—*Ohralik* v. *Ohio State Bar Association,* 436 U. S. 447 (1978)—which addresses only prohibitions against in-person solicitation. *Shapero,* 726 S.W. 2d at 300-301, Appendix to Petition at 6a - 8a.

*Second,* the Kentucky Court relied on the fact that with targeted direct mail solicitation it was *"entirely possible"* that potential clients would "feel overwhelmed by the basic situation which caused the need for the specific legal services and *may have a seriously impaired capacity* for good judgment." (Emphasis supplied.) *Shapero,* 726 S. W. 2d at 301; Appendix to Petition at 7a. However, there was no evidence in the record to support this general hypothesis.



*Third,* the Kentucky Supreme Court did *not* find as a matter of fact that the foreclosure defendants to whom Shapero's letter were addressed would have a sufficiality impaired capacity to act rationally when confronted with the Shapero letter.

*Fourth,* the Kentucky Supreme Court concluded that Kentucky's advertising presubmission process under SCR 3.135 did not provide adquate protection to the public. In so doing, the Kentucky Court did not consider the impact of other provisions of the Kentucky advertising rules such as the requirement that advertisements be submitted 30 days in advance of publication (SCR 3.135(6) (b) ); the provision for an investigative hearing to consider proposed advertisements (SCR 3.135(7) (a) ); and the right of the Kentucky Bar Association, in advance, to obtain injunctive relief against publication of a proposed advertisement (SCR 3.135 (8) (b) ).

*Fifth,* the decision of the Kentucky Supreme Court did not consider the fact that during all of the 19th Century and most of this century, when targeted direct mail solicitation was permitted in Kentucky, there was no record of significant enforcement problems.

The Kentucky Supreme Court's rule change in *Shapero* was only one of its frequent reversals in its approach to attorney advertising. Prior to 1946 Kentucky permitted solicitation by attorneys. For ex-

ample, in *Louisville Bar Association* v. *Hubbard,* 282 Ky. 734, 139 S. W. 2d 773, 775 (1940), the court held that "an attorney may personally solicit business with impunity, where he does not take advantage of the ignorance, or weakness, or suffering, or human frailties of the expected clients, and where no inducements are offered to them," *See also Chreste* v. *Louisville Railway Co.,* 167 Ky. 75, 180 S. W. 49, 53 (1915).

In 1946 Kentucky changed its course and adopted, as a statement of principles, the American Bar Association's Canons of Professional Ethics, including Canon 27 which prohibited all forms of advertising and solicitation. RCA (Rules of the Court of Appeals) 3.170. *See Kentucky State Bar Association* v. *Stivers,* 475 S. W. 2d 900, 903 (Ky. 1972).

In June, 1977, this Court's decision in *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977), rendered unconstitutional the ABA's blanket ban on advertising which had been incorporated into Kentucky's rules. One year later, the Kentucky Supreme Court in another about-face made what has been widely regarded as a major decision on lawyer advertising[3] when it ruled that solicitation of legal business by attorneys was not improper even through the use of direct mail sent to a prospective client in need of specific, identifiable, legal services. *Kentucky Bar Association* v. *Stuart,* 568 S. W. 2d 933 (Ky. 1978) (two Kentucky attorneys had been charged with violating DR 2-103 (A) for sending

[3]*See, e.g.,* Note, *Direct-Mail Solicitation by Attorneys; Bates to R.M.J.,* 33 Syracuse L. Rev. 1041, 1055 (1982).



letters to real estate agents seeking their closing business).

And finally, as pointed out above, *supra,* page 2, in 1982 the Kentucky Supreme Court radically changed the rules for the third time in a generation when it amended SCR 3.135 to ban once again all targeted direct mail solicitations.

Thus, in this century, from 1900 to 1946 and from 1977 to 1982, targeted direct mail solicitation was permitted in Kentucky, while it was not permitted from 1946 to 1977 and after 1982.

## SUMMARY OF ARGUMENTS

In seeking to impose an outright ban on truthful, non-deceptive, attorney advertising, the state has the burden of demonstrating that a substantial governmental interest is advanced by the ban and that the ban is proportionate to the state's interests. The only attorney solicitations which have failed to win approval in this Court are the in-person, hospital-bed solicitations described in *Ohralik.* Thus, in *Zauderer,* 471 U. S. at 647, this Court held:

> An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

Shapero's "printed advertising" falls squarely within this holding.

That targeted direct mail advertisements are constitutionally protected flows directly from *Zauderer's* approval of targeted newspaper advertisements and the approval of direct mail advertisements in *In re R. M.J.*, 455 U. S. 191 (1982). Any other conclusion is logically and constitutionally unsupportable. In essence, ABA Rule 7.3, which was applied in *Shapero,* precludes sending through the mail exactly the same information which was approved for newspaper publication in *Zauderer.* Also it is impossible to determine logically when a non-targeted mailing becomes a targeted mailing. Any argument that whether a mailing is targeted depends upon the number of *disinterested* people who receive the advertisement makes no constitutional sense.

The Shapero letter clearly does not fall within the prohibitions contained in *Ohralik.* Shapero's written, pre-screened advertisement is to be contrasted with the in-person, on-the-spot, hospital-room solicitation condemned in *Ohralik.*

The Kentucky Supreme Court's finding that it was *possible* clients might be overwhelmed by advertisements like Shapero's is not a constitutionally supportable basis for blanket censorship. Furthermore, there was no showing that the impact of a letter on potential clients allegedly having an impaired capacity would differ significantly from the impact of newspaper advertisements on these same persons. Therefore, the reasoning advanced by the Kentucky Supreme



Court does not distinguish direct mail advertisements from other types of advertisements.

The Kentucky Supreme Court's conclusion that no narrower regulation would be effective completely ignores the stringent requirements of Kentucky advertising law that advertisements must be submitted to a review commission thirty days before publication; that information about the recipients must be provided; that the Advertising Commission may conduct an investigation into proposed direct mailings; that the Commission may request editorial changes or disclaimers; that an advertisement now must include the disclaimer, "This is an advertisement"; and that the Kentucky Bar Association may seek an order from the Kentucky Supreme Court banning an advertisement, before it ever appears.

Finally, public policy and the wishes of potential clients themselves support the use of non-deceptive, targeted direct mail advertising to enable members of the public to receive crucial information about the availability of legal services. In view of the mere handful of problems with attorney advertising and the fact that targeted direct mail advertising reduces prices to consumers, it is clear, from a cost/benefit standpoint, that targeted direct mail advertising should be encouraged, not banned.

# ARGUMENTS

## ARGUMENT I

### Prior Decisions by This Court Have Provided a Clear Analytical Framework and Unambiguous Holdings Which Forbid Blanket Bans of Targeted Mailings.

#### A. Lawyer Advertising, As Commercial Speech, Is Protected By The First Amendment.

In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 770-71 (1976), this Court recognized that commercial speech is entitled to First Amendment protection except to the extent that it is false or misleading. A major factor in establishing the First Amendment commercial speech doctrine was the importance to the consumer of the free flow of commercial information. *Id.* at 763.

A four-part test is used to determine whether regulations on commercial speech pass First Amendment muster:

1. The speech must concern lawful activity and not be misleading;
2. The governmental interest in regulating the speech must be substantial;
3. The regulation must directly advance the governmental interest asserted; and
4. The regulation must not be more extensive than is necessary to serve that interest.

*Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U. S. 557, 566 (1980). *See Posadas de Puerto Rico Associates* v. *Tourism Co.*



*of Puerto Rico*, 478 U. S.——, 106 S. Ct. 2968, 2976 (1986).

Advertising by lawyers is commercial speech that "may not be subjected to blanket suppression." *Bates*, 433 U. S. at 383. In making this determination, this Court weighed heavily the fact that "[a]dvertising, though entirely commercial, may often carry information of import to significant issues of the day." *Id.* at 364.[4]

The *Central Hudson* test was explicitly applied to lawyer advertising in *R.M.J.*, 455 U. S. at 203, where this Court held that "restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." The state's authority to regulate advertising that is not actually misleading but only potentially misleading must be supported by a "substantial interest and the interference with speech must be in proportion to the interest served." *Id.*

Thus, in *R.M.J.* the *Central Hudson* test was effectively reduced to a two-step analysis:

1. Is the governmental interest substantial?
2. Is the regulation more restrictive than is necessary?

And in *Zauderer*, 471 U. S. at 641, this Court made clear that the burden was on the state to satisfy these requirements.

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[4]Where, as in this case and in *Zauderer*, the advertisement gives advice to the consumer about his or her legal rights, the First Amendment interest is particularly broad, if not compelling.

In *Bates,* this Court held that a state may not "prevent the publication in a newspaper of [a lawyer's] truthful advertisement concerning the availability and terms of routine legal services." 433 U. S. at 384. Not one of the six proffered justifications for the state's ban on the advertising rose "to the level of an acceptable reason for the suppression of all advertising by attorneys." *Id.* at 379.[5] While some regulation of lawyer advertising might be in order, a blanket ban on advertising was found more extensive than necessary to serve the state's interests. *Id.* at 383.

At the other end of the spectrum, this Court held that the state "constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." *Ohralik,* 436 U. S. at 449. This Court found that the governmental interest in "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct,' " is legitimate and compelling. *Id.* at 462. In so doing, however, this Court was careful to distinguish the *Ohralik* in-person

[5]The rejected justifications for the prohibition were (1) that price advertising would have adverse effects on the legal profession; (2) that advertising of legal services inevitably would be misleading; (3) that legal advertising would stir up litigation, adversely affecting the administration of justice; (4) that advertising would increase costs, which would be passed along to the consumer in the form of higher legal fees; (5) that advertisers of packaged, standard legal services would deliver a lower quality of services; and (6) that enforcement of less restrictive regulations on advertising would be too burdensome. *Id.* at 368-80.



solicitation from other types of written solicitations. *Id.* at 457, 465 n.25.

In *R.M.J.,* this Court set aside discipline that had been imposed upon a lawyer for "mailing announcement cards to persons other than 'lawyers, clients, former clients, personal friends, and relatives;' " listing in his advertisements "areas of his practice in language or in terms other than that provided by the Rule;" and "listing the courts and States in which he had been admitted to practice." 455 U. S. at 204, 207.

This Court ruled that the prohibition against general mailings to persons other than "lawyers, clients, former clients, personal friends, and relatives," was invalid as overly restrictive because even though "[m]ailings and handbills may be more difficult to supervise than newspapers," it is not "clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings." *Id.* at 206.

The legitimate state interests served by the ban on in-person solicitation upheld in *Ohralik* were found to be insufficient to support "prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems" in *Zauderer,* 471 U. S. at 638. Such a ban is more extensive than necessary since "print advertising generally . . . poses much less risk of overreach-

ing or undue influence" than in-person solicitation. *Id.* at 642.

In addition, this Court held that when an advertisement is not deceptive, the state's attempt to apply a prophylactic rule to prevent deception is "in tension with [the Court's] insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes." *Id.* at 644. Accordingly, "*[a]n attorney may not be disciplined for soliciting legal l[illegible]s through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.*" *Id.* at 647. (Emphasis supplied.)

**B. Most Authorities Have Embraced Targeted Direct Mail Advertising As Constitutionally Protected.**

Analyses by courts, most commentators, the Federal Trade Commission, the Department of Justice, the ABA Committee on Ethics and Professional Responsibility, the ABA Advertising Commission, and Kentucky's own Advertising Commission have concluded in a near-unanimous consensus that blanket prohibitions against targeted direct mail advertising are unconstitutional.[8]

[8] "Although *R.M.J.* originally was seen as the answer to the direct mail question, the courts have been reluctant to expand the decision beyond its facts. . . . But while the [state] courts have generally sided with the rights of states to strictly regulate direct-mail solicitation, contemporary writers have overwhelmingly approved the liberalization of the attorney advertising/solicitation rules." Note, *Constitutional Law—First Amendment Commercial*

*(Footnote Continued on Next Page)*



*Adams* v. *Attorney Registration & Disciplinary Commission,* 801 F. 2d 968 (7th Cir. 1986), involved facts virtually identical to those in issue here. "Adams [sent] letters to persons who [were] named defendants in resident mortgage foreclosure proceedings advising the recipient to 'Save Your Home' and includ[ed] a pamphlet which suggest[ed] the retention of Adams' law firm to help initiate Chapter 7 or Chapter 13 proceedings." *Id.* at 969. In permitting the targeted direct mailing, the Seventh Circuit ruled that while the governmental interest of preventing overreaching and undue influence is clearly legitimate,

> the interest of the targeted audience in receiving the information is strong, [and] the state concerns that underscored the Court's decision in *Ohralik* are less pressing with targeted mailings than with in-person solicitation. In this connection, individuals are less subject to harassment, overreaching and duress through mailings than they are through direct personal contact.

*Id.* at 973.

Likewise, the United States District Court for the Eastern District of Pennsylvania, in striking down an

*(Footnote Continued From Preceding Page)*

*Speech—Attorney Solicitation—In re von Wiegen,* 34 Kansas L. Rev. 191, 201-203 (1985). The only cases upholding the constitutionality of targeted direct mail advertising were decided before *Zauderer: State* v. *Moses,* 642 P. 2d 1004 (Kan. 1982); *The Florida Bar* v. *Schreiber,* 407 So. 2d 595 (Fla. 1982); *In re Frank,* 440 N. E. 2d 676 (Ind. 1982); *Dayton Bar Association* v. *Herzog,* 436 N. E. 2d 1037 (Ohio 1982); *Allison* v. *Louisiana State Bar Association,* 362 So. 2d 489 (La. 1978).

absolute ban on targeted direct mail solicitation, concluded that the problems addressed in *Ohralik* with in-person solicitation were not present with "direct mailings to targeted segments of the population." *Spencer* v. *Honorable Justices of Supreme Court of Pennsylvania,* 579 F. Supp. 880, 882, 891 (E.D. Pa. 1984), *aff'd sub nom. Spencer* v. *Supreme Court of Pennsylvania,* 760 F. 2d 261 (3d Cir. 1985).

The highest court of New York has taken a like position. In *Koffler* v. *Joint Bar Association,* 51 N. Y. 2d 140, 412 N. E. 2d 927 (1980), *cert. denied sub nom. Joint Bar Association Grievance Committee, Tenth Judicial District* v. *Koffler,* 450 U. S. 1026 (1981), and *In re Von Wiegen,* 63 N. Y. 2d 163, 470 N. E. 2d 838 (1984), *cert. denied sub nom. Committee on Professional Standards* v. *Von Wiegen,* 472 U. S. 1007 (1985), that court reversed lower court rulings banning targeted direct mail advertising directed to real estate and personal injury clients respectively. In *Koffler,* the court recognized that "[i]nvasion of privacy and the possibility of over-bearing persuasion, both of which were condemned in *Ohralik* . . . are not sufficiently possible in mail solicitation to justify banning it." *Koffler,* 412 N. E. 2d at 933, *citing Consolidated Edison Co.* v. *Public Service Commission,* 447 U. S. 530, 542 (1980).

And in 1986 the Supreme Judicial Court of Massachusetts amended its anti-solicitation rules to allow targeted direct mail advertising. *In re Amendment* to *S.J.C. Rule 3:07,* 398 Mass. 73, 495 N. E. 2d 282



(1986). As to the constitutionality of rules prohibiting such advertising, the court stated that

> [b]ased on the . . . Supreme Court cases, we need not discuss the advisability, from a policy point of view, of disciplinary rules that would prohibit truthful, noncoercive, indirect lawyer solicitation of employment *for a fee* by such means as mail, leaflet, or electronic device, or solicitation on behalf of nonprofit organizations as in *In re Primus,* [436 U. S. 412 (1978)]. *Such rules would not be constitutional.*

398 Mass. at 80-81, 495 N. E. 2d at 287 (emphasis supplied).

The commentators have also strongly supported liberalization of advertising rules to allow targeted direct mail advertising. Maute, *Scrutinizing Lawyer Advertizing and Solicitation Rules Under Commercial Speech and Antitrust Doctrine,* 13 Hastings Const. L.Q. 487, 520-23 (1986); Ringleb, *Lawyer Direct Mail Advertisements: Regulatory Environment, Economics, and Consumer Perceptions,* 17 Pac. L.J. 1199, 1218, 1245 (1986); Note, *Constitutional Law—The Liberalization of Attorney Commercial Speech Rights, Zauderer* v. *Office of Disciplinary Counsel,* 21 Wake Forest L. Rev. 1019, 1036 (1986); Moss, *The Ethics of Law Practice Marketing,* 61 Notre Dame L. Rev. 601, 675-76 (1986); Comment, *Professional Ethics—Direct Mailings by Attorneys to Target Audiences,* 16 Mem. St. U.L. Rev. 409, 417 (1986); Note, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertis-*

*ing and Solicitation: Consumer Loses with the Zauderer Decision,* 65 N.C.L. Rev. 170, 190-94 (1986); Note, *Lawyer Advertising,* 61 Wash. L. Rev. 903, 909-12 (1986).

In a letter sent in September, 1984, to the highest courts in 40 states, the Antitrust Division of the United States Department of Justice warned that "[t]he American Bar Association's Model Rules of Professional Conduct governing fees, solicitation, and advertising are overly broad and may be anticompetitive." *Division Finds Competitive Problems with ABA's Professional Conduct Rules,* 47 Antitrust & Trade Reg. Rep. (BNA) No. 1183, at 570 (September 27, 1984). The Department of Justice noted that "[p]ortions of the model rules governing advertising and solicitation 'do not meet [the responsibility of furthering the public interest as opposed to the self-interested concerns of the bar] because they would restrict the flow of useful information from attorneys to consumers of legal services.'" *Id.* Recognizing that "[s]uch restrictions . . . 'would adversely affect competition and consumer welfare,'" the Department "recommended rejection of Model Rule 7.3, which severely restricts direct lawyer-initiated communications with prospective clients." *Id.* at 570, 571.[7]

[7]ABA Rule 7.3 has been criticized as adopting "the narrowest and, perhaps, the least defensible" prohibitions on attorney solicitations. Moss, supra p. 19, at 677. On its face, the rule even prohibits solicitation by one attorney of another who may be in need of his or her services. *Id.* at 686.



In 1986 the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Commission on Advertising recommended that ABA Rule 7.3 be deleted, asserting that it was "probably unconstitutional" and that there were significant consumer benefits from targeted direct mail advertising. Nonetheless, after the ABA Board of Governors voted against the proposed change, the issue was withdrawn from consideration by the ABA House of Delegates. *Changes to ABA Model Rule On Direct Mail Are Proposed,* 2 ABA/BNA Lawyers' Manual on Professional Conduct No. 24, at 479, 480 (December 24, 1986), and *ABA Acts On Tort Reform, Other Issues At Midyear,* 3 ABA/BNA Lawyers' Manual on Professional Conduct No. 3, at 48, 49 (March 4, 1987).

In a February, 1987, letter to the members of the ABA's House of Delegates, the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission "applauded a proposed amendment to the American Bar Association's model rules to eliminate restrictions on targeted mail solicitation."[8] *FTC Staff Urges ABA to End Restraints on Most Attorney Solicitations of Clients,* 52 Antitrust & Trade Reg. Rep. (BNA) No. 1302, at 268 (February 12, 1987). "Targeted mailings, the [FTC] asserted, are beneficial as well to consumers because they can lower search costs. . . . The ABA's rules should prohibit only uninvited, in-person solicitation

[8]The FTC staff was referring to the Ethics Committee/Advertising Commission proposal discussed, *supra* p. 20.

of persons who, because of their particular circumstances, are vulnerable to undue influence, prospective clients who have made it known that they do not wish to receive communications; and any false or deceptive advertising." *Id.* at 269.

Finally, the Kentucky Advertising Commission in its decision on the Shapero letter concluded:

> We believe the regulation involved should be amended by the Kentucky Supreme Court in view of the decisions discussed herein because of its impact on the First Amendment to the Constitution and the free speech provisions contained therein.

Appendix to Petition at 15a.

## ARGUMENT II

### Because Shapero's Written Advertisement Was Not Found To Be False, Misleading or Deceptive, It Is Protected Under *Zauderer* and *R.M.J.*

As pointed out above, in *Zauderer,* 471 U. S. at 647, this Court held:

> An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

In contrast the Kentucky Supreme Court in its *Shapero* opinion recast the *Zauderer* decision, limiting the holding to its facts by inserting the word "newspaper" so that the quote from the Kentucky Supreme Court now reads:



> An attorney may not be disciplined for soliciting legal business through printed *newspaper* advertisements which contained truthful and nondeceptive information and advice regarding the legal rights of potential clients.

*Shapero,* 726 S.W. 2d at 300; Appendix to Petition at 4a. (Emphasis supplied.)

Since there was no finding below that the Shapero advertisement was false, misleading, deceptive or overreaching, there is no basis for imposing absolute censorship on this printed advertisement, which meets all of the requirements of the *Zauderer* decision.

Moreover, since *R.M.J.* permits advertisements to be sent by direct mail to potential clients, and since *Zauderer* permits written advertisements directed to those known to be in need of specific legal services, it is clear from *Zauderer* and *R.M.J.* taken together, that targeted direct mail solicitation is constitutionally protected.

Any other interpretation of *Zauderer* and *R.M.J.* would create a fine constitutional mess, for the interface between newspaper advertising and direct mail advertising is at least as unclear as the distinction between targeted and nontargeted mailings.

Under ABA Rule 7.3 would the Kentucky Supreme Court prohibit an attorney from starting a newspaper which provides corporate legal advice and sending it to the owners of new corporations? Many large firms across the country now send out such "newsletters." What is the difference between a written newspaper,

a written newsletter, and a letter or any other form of printed advertisement for that matter?

Under ABA Rule 7.3 could an attorney employ a special interest newspaper as the medium for directly soliciting subscribers who may be in need of legal services specifically tailored to their special interests? For example, assume there is evidence that wholesale gasoline dealers in Kentucky have fixed wholesale gasoline prices. And suppose that an attorney wished to solicit Kentucky retail gasoline dealers for an antitrust suit against these wholesalers. Presumably, running an advertisement in a Kentucky Retail Gasoline Dealers Association's newsletter seeking antitrust plaintiffs would be perfectly appropriate under *Zauderer*. But, is placing that advertisement in any way different from obtaining the subscriber's list for that newsletter and mailing a letter with exactly the same information directly to each of the subscribing retail gasoline dealers soliciting their participation in the antitrust suit?[9]

Can it rationally be argued in light of *Zauderer* that it would be inappropriate for Mr. Zauderer to identify a particular Dalkon shield user and send her, by mail, the *Columbus Citizen Journal* newspaper advertisement referred to in *Zauderer*? Yet under the Kentucky rule, that conduct clearly would be prohibited.

[9]Moreover, as discussed in Argument V, Section E, the rights of these potential antitrust plaintiffs would be better served by *private* direct mail solicitation than by *public* newspaper solicitation which would run the risk of prematurely warning potential defendants who might then destroy critical evidence or seek to settle claims with potential plaintiffs at an unfairly low price.



Permitting censorship of constitutionally protected activities based on such flimsy and arbitrary distinctions as whether an attorney sends an advertisement in a newsletter as opposed to mailing the same advertisement to the newsletter's subscribers is the essence of a distinction without a constitutional difference.[10]

ABA Rule 7.3 also purports to make fundamental distinctions between targeted and nontargeted direct mail advertisements. But the basis for these distinctions also escapes any kind of rational analysis.

For example, sending the Shapero letter to all residents of Magoffin County, Kentucky would presumably be perfectly appropriate, even if some recipients, by coincidence, happened to be property owners whose property had been foreclosed upon. But, suppose that 20 percent of all recipients in that county were known to be involved in foreclosure law suits. Does this higher level of coincidence mystically transmute the letter from non-targeted to targeted solicitation? At what point does a letter become targeted? Must *all* recipients be known to need the services or only 90 percent, or 60 percent? Perhaps 40 percent is sufficient. The

[10]*See* Karst, *Equality As a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20, 36, 37 (1975). Stated another way, once a medium of expression is opened up for public use—as direct mail advertising was in *R.M.J.*—a state may not discriminate among those who would use that medium based upon the contents of their speech. Here the ABA would permit direct mail containing general information but would forbid direct mail containing specific information about identifiable legal problems of interest to a targeted audience. Drawing such a distinction constitutes a quintessential denial of equal protection. *Police Department of the City of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972).

point is that there is no rational means to define a targeted as opposed to a non-targeted solicitation.

Can there logically be any constitutional difference between attorney A, who efficiently pinpoints his or her advertising program so that advertisements are sent by mail only to that one percent of the population whose property has been foreclosed upon, and attorney B who, instead, employs a more costly blunderbuss approach, sending his or her advertising message by mail not only to the one percent to whom it is pertinent but also to the remaining ninety-nine percent who are not faced with foreclosure? In either case, the same one percent of the population is receiving the same message although in one case a surgical strike has insured that other members of the population do not also receive the letter.

In the final analysis, *how can First Amendment protected speech possibly be evaluated based upon the number of people who are not interested in receiving it?* Certainly, if the issue is the impact of an advertisement on a potential client, the client's reaction "will in no way be affected by whether the rest of the world, or only those facing foreclosures also receive[d] the letter." *Adams* v. *Attorney Registration and Disciplinary Commission,* 617 F. Supp. 449, 455 (N.D. Ill. 1985), *aff'd,* 801 F. 2d 968 (7th Cir. 1986).

## ARGUMENT III

### The Shapero Advertisement Does Not Fall Within The Prohibitions Approved in *Ohralik.*

The Kentucky Supreme Court in its decision found that the Shapero letter constituted "solicitation" pro-



hibited by *Ohralik* rather than "advertising" permitted by *Bates, R.M.J.* and *Zauderer.*[11]

But a "state cannot foreclose the exercise of constitutional rights by mere labels," *NAACP* v. *Button,* 371 U. S. 415, 429 (1963), and "[t]he character of the mailing, be it solicitation or advertising should not be treated as significant." *In re Appert,* 315 N. W. 2d 204, 211 (Minn. 1981). "Regardless of the particular label asserted by the state—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow* v. *Virginia,* 421 U. S. 809, 826 (1975).[12]

In *Ohralik* this Court held that in-person solicitation, at least under the specific facts of that case, could be banned. Prime among the considerations justifying this ban were the dangers inherent in the approach of an accident victim by a trained advocate while the victim was still in the hospital and the fact that such conduct could not be regulated in any manner other

[11] "[D]irect mail is considered by marketing experts to be an *advertising* medium." Andrews, *Lawyer Advertising and the First Amendment,* 1981 Am. Bar Found. Research J. 967, 1018 (1981) (Emphasis supplied).

[12] In fact, this Court implicitly acknowledged that targeted advertisements were employed to *solicit* legal business: "Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to *solicit* or obtain legal business directly advances a substantial governmental interest." *Zauderer,* 471 U. S. at 641 (emphasis supplied).

than by an outright ban. *Ohralik,* 436 U. S. at 467-68. Simply put there was no effective way for states to regulate oral statements made by an attorney in the privacy of a hospital room. *Id.* at 466.

But this Court was careful to distinguish a written advertisement which "simply [provides] information and leaves the recipient free to act upon it or not" from in-person solicitation where "there is no opportunity for intervention or counter-education by agencies of the Bar." *Id.* at 457. The *Ohralik* Court recognized that the potential client who was the object of in-person solicitation was "[u]nlike the reader of an advertisement, who can 'effectively avoid further bombardment of [his or her] sensibilities simply by adverting [his or her] eyes.'" *Ohralik,* 436 U. S. at 465 n.25, *quoting Cohen* v. *California,* 403 U. S. 15, 21 (1971).

Thus there are critical differences between the in-person solicitation sanctioned in *Ohralik* and the targeted direct mail solicitation proposed by Shapero:

*First,* the Shapero advertisement had the benefit of a full review and analysis by the KBA's Advertising Commission—thereby providing a clear opportunity for "intervention . . . by agencies of the Bar." *Ohralik,* 436 U. S. at 457. Under these circumstances there was absolutely no danger that the proposed advertisement would be false, misleading, deceptive or coercive. For similar reasons this Court found the written direct mail solicitation at issue in *In re Primus,* 436 U. S. at 435-



36, to be much easier to police than the oral solicitation in *Ohralik.*

*Second,* unlike the hospitalized accident victims in *Ohralik,* the recipients of Shapero's letters could disregard them or toss them in the trash just as they could ignore a billboard, a radio, or a television advertisement. As the Massachusetts Supreme Court stated in ruling upon the propriety of a targeted direct mail ban in *In re Amendment to S.J.C. 3:07,* 398 Mass. at 82, 495 N. E. 2d at 288, "[a]n individual confronted with a piece of mail from an attorney is not under pressure to respond immediately, or to engage in a dialogue about his legal needs. Such an individual may treat a written communication in the same manner as any other letter proposing a business transaction: if it is unwanted, he simply can throw it away." *Accord Adams,* 801 F. 2d at 973 ("It is easier to throw out unwanted mail than an uninvited guest").

*Third,* unlike the *Ohralik* in-person solicitation, Shapero's direct mail advertisements "lack the coercive force of the personal presence of a trained advocate." *Zauderer,* 471 U. S. at 642. The quoted distinction, drawn by this Court between the *Zauderer* newspaper advertisements and the *Ohralik* in-person solicitation, applies with equal force to Shapero's written advertisement.

*Fourth,* unlike the *Ohralik* in-person solicitation, Shapero's letters and *Zauderer's* targeted newspaper advertisements required no "immediate yes-or-no an-

swer" and were "more conductive to reflection and the exercise of choice." *Zauderer*, 471 U. S. at 642.

In sum, as one commentator stated:

> But what if the solicitation does not involve a face-to-face encounter between the lawyer and the potential client? What if the solicitation of employment is mailed to the lay person's home or business? The pressure for an immediate response, the lack of time to reflect and reconsider the offer after seeking other advice, the potential for intimidation and overreaching, and the inability of others to intervene are greatly reduced if not absent. Thus, mailed solicitations should not be prohibited altogether as in-person contacts may be.

Moss, *supra* p. 19, 675-76.

## ARGUMENT IV

### Under the Analytical Framework Adopted by This Court, Kentucky Has Not Met Its Burden to Justify the Blanket Ban It Imposed.

Under *Zauderer* and *R.M.J.*, since there was no finding below that Shapero's advertisement was either false or deceptive, the burden is on the state to establish that the total ban on targeted direct mail advertising advances and is proportionate to a substantial state interest. *Zauderer*, 471 U. S. at 641. Accordingly, the argument of the Kentucky Bar Association in its Brief in Opposition to the Petition for Certiorari that the Kentucky Supreme Court's decision in *Shapero* is a "judgment call" carrying a "presumption of correctness" runs counter to the latest holdings of this Court. *See* Response to Petition for Certiorari at 13. A presumption of correctness simply does not attend decisions by state courts imposing blanket bans on non-deceptive commercial speech.



Logic and policy also should militate against giving *any* deference to the Kentucky Supreme Court's decision because that Court simply adopted verbatim a rule advanced by a trade association—the American Bar Association. As the paid representative of hundreds of thousands of lawyers, the American Bar Association is not a disinterested third party when promoting rules restricting lawyer advertising. An advertising restriction, such as one against direct mailings, "while superficially intended to benefit consumers by protecting them from over-commercialization and professionals motivated by profit, reduce[s] competition and increase[s] prices." Ringleb, *supra* p. 19, at 1232. In fact, regulation is often procured by the regulated business in order to protect its own narrow interests.[13] Adopting verbatim the proposal of a trade association is no substitute for factual analysis.

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[13] *See* Stigler, *The Theory of Economic Regulation*, 2 Bell J. Economics and Management Science 6 (1971). As Judge Posner has observed, "The railroads supported the enactment of the first Interstate Commerce Act which was designed to prevent railroads from practicing price discrimination, because discrimination was undermining the railroad's cartel. American Telephone & Telegraph pressed for state regulation of telephone service because it wanted to end competition among telephone companies. Truckers and airlines supported the extension of common carrier regulation to their industries because they considered unregulated competition excessive." Posner, *Theories of Regulation*, 5 Bell J. Economics and Management Science 335, 337 (1974).

**A. The Blanket Ban On Targeted Direct Mail Advertising Contained in ABA Rule 7.3 Does Not Advance Substantial Governmental Interests Which Are Different In Kind From Those Advanced In Support Of The Rules Invalidated By This Court's Prior Decisions.**

According to the Kentucky Supreme Court, the substantial governmental interest advanced by ABA Rule 7.3 involves "the serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." *Shapero,* 726 S. W. 2d at 301; Appendix to Petition at 7a. The Kentucky Supreme Court felt it was "*entirely possible* that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the *possibility of undue influence, overreaching and intimidation.*" *Id.* (Emphasis supplied.)

But the Kentucky Supreme Court had no factual basis for the assertions it advanced in support of its new rule. There was simply no underlying evidence anywhere in the record of the potentialities it found. In fact, the body having the most familiarity with advertising, the Kentucky Attorneys Advertising Commission, believed that the Kentucky targeted direct mail solicitation rule did not pass constitutional muster because adequate protections were provided under SCR 3.135.[14] Appendix to Petition at 13a. That the very

[14]Likewise, the ABA bodies having the most familiarity with nationwide legal advertising—its Ethics Committee and Adver-

*(Footnote Continued on Next Page)*



body with the most experience in reviewing and evaluating lawyer advertisements in Kentucky found no serious potential of abuse with targeted direct mailings is strong evidence of the lack of demonstrable support for the Kentucky Supreme Court's position.

Historical experience also does not appear to have dictated the Kentucky rule prohibiting targeted solicitation. As shown above, *supra* pp. 7-8, during much of this century and all of the last century, Kentucky and many other states had no rule precluding targeted solicitation.[15] Even as recently as the period from 1977 until 1982, there was no such prohibition in the Kentucky rules. In fact, in 1978, Kentucky was in the forefront of developing attorney advertising law when, in *Kentucky Bar Association* v. *Stuart,* 568 S. W. 2d at 934, it permitted advertising directed to a targeted audience. The Kentucky Court there held that the

*(Footnote Continued From Preceding Page)*

tising Commission—came to a similar conclusion about ABA Rule 7.3. *See supra* at p. 20.

[15]For example, in 1855, the Supreme Court of Illinois decided an important case involving the taxation of powers of counties. *Illinois Central Railroad* v. *County of McKlean,* 17 Ill. 291 (1855). One of the lawyers for the Illinois Central was Abraham Lincoln. This much of history is well known. What is not so well known is that Lincoln was employed by the Illinois Central, apparently as a result of a targeted direct mail solicitation after his initial targeted direct mail solicitation of the defendant county had been refused. Lincoln wrote: "I am now free to make an engagement for the [Illinois Central] and if you think fit you may 'count me in.' Please write me, on receipt of this. I shall be here at least ten days." Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective,* 65 Marquette L. Rev. 547, 548 (1982).

"fact that an advertisement is in the form of a letter does not increase the likelihood of those evils [i.e., overreaching and deception] occurring." *Id.* It bodes ill for Kentucky now to argue that there is in 1987 a danger of overreaching and deception with the Shapero direct mail advertisement when no similar dangers existed one decade ago when *Stuart* was decided.

The Kentucky Supreme Court's holding that targeted direct mail solicitations are full of the "possibility of undue influence, overreaching or intimidation" is also suspect. While this *possibility* may exist, it is also possible that lawyers may intimidate existing clients when they come into the office. *Anything is possible.* The real questions are: What is likely? What has been established? Certainly the *possibility* that a few lawyers may engage in unethical conduct is not a basis for banning all lawyers from advertising.[16] Rather, it is a basis for imposing regulations which address the problems of undue influence, overreaching or intimidation in a measured fashion.

Assume for the moment that Shapero's potential clients *may* possibly be overwhelmed by the fact their homes have been foreclosed upon and "may have seriously impaired capacity" which would somehow limit their abilities rationally to enter into legal contracts.[17]

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[16] "For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straight forward." *Bates*, 433 U. S. at 379.

[17] We seriously doubt that the Kentucky Supreme Court would relieve any of these potential clients from a default judgment for

*(Footnote Continued on Next Page)*



This same "possibility," however, applies with equal force both to the targeted newspaper advertisements approved in *Zauderer* and the targeted mailings Shapero would employ. The same hyper-vulnerable potential client would still be overwhelmed by the foreclosure action and would still have the same reduced capacity upon reading the newspaper advertisement. The rationale advanced by Kentucky, therefore, does not distinguish potential targeted direct mail advertising clients from potential targeted newspaper clients.

In the final analysis, while potential clients whose homes have been foreclosed upon may feel overwhelmed by the situation, the *wisest thing they can do is seek immediate legal advice.* Keeping people in the dark about their legal rights, including their right to file bankruptcy, does not help them.

The impact of the Kentucky Supreme Court's decision is that many potential clients must resort to the "good ol' " ways of finding out about lawyers. Before lawyer advertising most clients learned about lawyers by talking to friends, relatives, co-workers or simply by hearing about them on the street, or wherever, all from totally unregulated sources, many of whom are

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failure to respond to the foreclosure suit because they "lacked the capacity" to understand what was going on. *See Crowder v. American Mutual Liability Insurance Co.*, 379 S. W. 2d 236, 238 (Ky. 1964) (lack of formal education and knowledge about court papers insufficient grounds to set aside default judgment).

among the least likely to know about legal services.[18] Certainly consumers of legal services are better served by obtaining information about lawyers which has been edited and sanitized by an Advertising Commission to remove even a hint of the false, misleading or deceptive. Proscribing targeted direct mail solicitation may well leave consumers in the position of having to rely upon sources of information which are far more fraught with the dangers of misinformation.

**B. In Light Of Kentucky's Existing Mechanism For Reviewing Advertisements, The Blanket Ban Contained in ABA Rule 7.3 Is More Restrictive Than Has Been Shown To Be Necessary.**

The entirety of the Kentucky Supreme Court's findings respecting the scope of any permissible restrictions are contained in one sentence: "We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." *Shapero,* 726 S. W. 2d at 301; Appendix to Petition at 7a. No evidentiary support was given for this peremptory conclusion, which was directly at variance with the Advertising Commission's findings that the presubmission process *did* provide adequate protection. As this Court concluded in *Zauderer,* "The State's arguments amount to little more than *unsupported assertions:*

[18] "[T]hese consumers will be forced to select legal representation on the basis of haphazard and often irrelevant criteria. Further, these clients may lose important legal rights because they are unable to understand the legal system, or even because they fear it." Maute *supra* p. 19, at 533.



nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses . . . cannot be combated by any means short of a blanket ban." *Zauderer,* 471 U. S. at 648 (emphasis supplied).

In concluding that present Kentucky rules, which are among the most stringent in the country, do not provide adequate protection to the public from potentially abusive targeted mailings, the Kentucky Supreme Court simply ignored the wide range of consumer protections provided by its own rules:

• In *R.M.J.,* 455 U. S. at 206, and *Central Hudson Gas,* 447 U. S. at 571 n.13, this Court suggested one approach to protecting the public from false, misleading or deceptive advertisements would be to require presubmission of advertisements to an appropriate state advertising review body. Requiring targeted direct mailings to be prescreened by such a regulatory body "provides true safeguards for the consumer of legal services before harm occurs from inappropriate, overbearing, or misleading targeted mail" while being "consistent with the first amendment protections available for this form of commercial speech." Perschbacher & Hamilton, *Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising,* 58 U. Colo. L. Rev. 255, 278 (1987). Kentucky adopted such a rule in 1982 with the creation of its Advertising Commission. See SCR 3.135(1).

• Under the Kentucky rule, an attorney is required to submit advertisements 30 days in advance of use,

thereby reducing the possibility that potential clients will be solicited while in a state of "bereavement." SCR 3.135(6)(b).

• In order to insure that full information about recipients is obtained, the Kentucky rule requires:

> Any advertisement mailed or delivered to an individual addressee or addressees, shall be mailed to the Commission along with a list of all persons or firms or groups to whom it has been sent.

SCR 3.135(6)(a)(ii).

• The Advertising Commission, under its general powers, may issue subpoenas and investigate the circumstances surrounding any proposed advertisement. SCR 3.135(3)(e)(iii).

• The Advertising Commision is empowered not only to suggest editiorial changes in advertisements but also to require the insertion of appropriate disclaimers. SCR 3.135(7)(a).

• As suggested by this Court in *R.M.J.*, 455 U. S. at 206 n.20, in order to allay any fears that direct mail advertisements might be mistaken as something else or might frighten faint-hearted recipients, under the Kentucky rule most advertisements used after January 1, 1987, which relate to an area of practice must include the disclaimer, "This is an advertisement." SCR 3.135(5)(b)(ii).

• When all else fails, the Kentucky Bar Association's Executive Director may seek an order banning an offensive advertisement — before it ever appears. SCR 3.135(7)(b).



Thus, Kentucky advertising rules provide ample protection to the public from overreaching, false, misleading or deceptive, targeted direct mail advertisements.

## ARGUMENT V

### Public Policy Favors Nondeceptive, Targeted Direct Mail Advertisements.

#### A. In The Ten Years Since Bates, There Have Been No Significant Problems For Consumers With Attorney Advertising.

A review of attorney disciplinary actions reported in the *West National Reporter System* since the *Bates* decision in 1977[19] shows that of the 240 attorney disciplinary cases reported in this ten year period, only 30 involved allegations of attorney advertising abuse. Thirteen of these cases involved targeted direct mail advertisements of which only two concerned constitutionally supportable prosecutions. In the remaining eleven cases discipline was imposed because targeted, direct mail was *per se* improper.

Thus, since *Bates*, only two of 240 disciplinary cases have concerned constitutionally supportable disciplinary charges involving targeted mailings. While there undoubtedly are many more unreported disciplinary cases, given the predisposition of attorney regulators against advertising, the fact that nearly 90 percent of all serious disciplinary charges involved something

[19]The search was performed by computer and manually of all cases reported in the West system under the subject "Attorney and Client," Key number 32 (Regulation of Professional Conduct, in General).

other than advertising shows that there are no widespread problems of attorney advertising abuse in general or targeted direct mail abuse in particular.

Indeed it is doubtful that attorney advertising presents any special problems with deception.[20] In fact, deception may be even less of a problem with attorney advertising than elsewhere in commerce. As Professor McChesney stated in *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. Pa. L. Rev. 45, 104 (1985), "Professionals depend on repeat business and recommendations from others for their livelihood." If they are deceptive, they will not get repeat business and recommendations. "There is simply no reason to believe that consumers are as easily deceived as some professionals seem to believe." *Id.* at 110-11.

Surveys have found that consumers actually prefer mor advertising information about lawyers than less. In one survey, consumers were found to prefer direct mail advertising over radio, television and billboards, while among lawyers only billboards were less subject to scorn than was direct mail. According to the survey, "[m]ost consumers felt that lawyers should be allowed to use the mail, while lawyers felt that direct mail advertising should not be used by the profession." Ringleb, *supra* p.19, at 1240. The con-

[20] *See Zauderer*, 471 U. S. at 646, n.13, *citing* Federal Trade Commission Staff Report, *Improving Consumer Access to Legal Services: The Case for Removal of Restrictions on Truthful Advertising*, at 149-155 (1984) (hereafter "the *FTC Report*").



clusion was inescapable: Consumers were much more favorable toward lawyer advertising than were lawyers. *Id.*

**B. Targeted Direct Mail Advertising Reduces Prices To Consumers.**

The *FTC Report, supra* note 20, at 77-127, contained a comprehensive study which found that advertising of legal services tends to reduce costs.[21] As the study concluded, "[f]or each of the five legal services studied, lower prices were found in cities where the fewest restrictions on advertising existed. . . . [T]here appears to be a continuous relationship between prices and regulations, with the lowest prices associated with the fewest restrictions on attorney marketing practices." *FTC Report, supra* note 20, at 126. The report showed that with respect to the most complex types of legal services studied—divorces and personal injury actions —where there was no direct mail advertising, prices were higher. *FTC Report, supra* note 20, Table D at 106.[22] Thus, especially for complex legal services, in-

[21] The finding of reduced costs is consistent with studies of the effects of advertising in other professions and markets. Such studies consistently find that restraints on advertising keep the cost of goods and services elevated. *See* McChesney, *supra*, p. 39, at 78 n.157.

[22] Table D also showed that for simple wills, the prices were lower in the presence of direct mail advertising restrictions. However, it is difficult to envision that targeted direct mail solicitation for simple will legal business could ever occur. How would one determine that a particular person does not have a will? Therefore, as to targeted mail solicitation for simple wills, the study does not appear to measure a real-world cause and effect relationship.

creasing use of direct mail advertising reduces consumer costs.

**C. Targeted Direct Mail Advertising Is More Cost Efficient.**

Apparently Kentucky would not object to Shapero's advertisement appearing on television or in newspapers. However, that blunderbuss approach to advertising is not nearly as effective and is certainly more costly than contacting, by mail, each person whose home has been foreclosed upon.[23] When advertising is less costly,[24] it stands to reason that the overall costs of legal services to consumers will also drop.[25]

[23] "Direct mail advertising, for example, allows the advertising to be directed at a well defined audience, is flexible with regard to length, timing, and form, and permits faster and more accurate evaluation of effectiveness than do other forms of advertising." Note, *supra*, p. 20, 61 Wash. L. Rev. at 903 n.4. *See also* Whitman & Stoltenberg, *Direct Mail Advertising by Lawyers*, 45 U. Pitt. L. Rev. 381, 417-418 (1984).

[24] In Comment, *Attorney Direct Mail Communication: The Koffler Commercial Speech Approach*, 4 Western New England L. Rev. 397, 402 n.32 (1982), the author stated that the cost of the most productive form of general circulation advertisement was about $1.00 for each $8.00 of legal business generated, while the figure for one targeted direct mail advertising campaign was $25.00 of legal business for each dollar of advertising expenditure.

[25] With advertising, several factors are at work. While the direct cost of advertising, as part of overhead, is passed on to the consumer, as the FTC found, when there is more advertising, prices overall go down. *See FTC Report, supra* note 20, at 81, 82, 126. *See also* Hudec & Trebilcock, *Lawyer Advertising and the Supply of Information in the Market for Legal Services*, 20 U.W. Ontario L. Rev. 53, 75 (1982). Accordingly, if lawyer advertisers choose the lowest cost, most efficient means of advertising, legal costs should be reduced further than if higher priced advertising means are employed. *See also Bates*, 433 U. S. at 377-78 n.34, n.35.



There is simply no reason not to have a free market in attorney advertising. The freedom to advertise plays an essential role in a free market by promoting competition. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Counsel*, 425 U. S. at 764-65. There is no justifiable economic benefit in requiring Shapero to spend more money to do the same thing he could do more efficiently by direct mail.

When the benefits to all consumers of the lower prices which result from targeted direct mail advertising are weighed against the few reported incidents of attorney overreaching or deception, the decision comes down heavily on the side of permitting targeted direct mail advertising. The two reported cases of attorney direct mail advertising discipline which were properly upheld pale in comparison to the thousands of direct mail advertising transactions which undoubtedly have occurred in the 22 states which now permit targeted direct mail advertising.[26] Thus, the economic benefits to consumers of targeted direct mail advertising far outweigh any potential losses to these consumers from the actions of a few unscrupulous attorneys.

**D. Public Policy Supports Providing More Information To Consumers Of Legal Services.**

By banning such an efficient and effective means of advertising, the Kentucky Supreme Court is hurt-

[26] *See Rule 11, Malpractice Insurance Among Topics at ABA Meeting*, 3 ABA/BNA Lawyers' Manual on Professional Conduct No. 15, at 264, 270 (August 19, 1987).

ing consumers. As this Court stated in *Bates*, consumers need to have adequate commercial information in order to make informed and reliable economic decisions. 433 U. S. at 364. "[D]irect mail arguably serves that interest better than other forms of advertising because targeted solicitation is likely to reach the consumer at a time when his or her need for such information is greatest." Note, *supra* note 3, 33 Syracuse L. Rev. at 1070.

By banning direct mailings, Kentucky is depriving consumers of a means by which they can be informed about the legal profession and can learn of important legal rights. Studies demonstrate that much of the American public is still not being adequately reached or served by the legal profession; often fails to recognize when it has legal problems; and often does not seek counsel due to erroneous and unrealistic beliefs about attorneys' fees. *See Bates*, 433 U. S. at 370 n.22, 376; Note, *supra* note 3, 33 Syracuse L. Rev. at 1070 n. 197; McChesney, *supra* p. 40, at 107-108; and Note, *supra* p. 19, 65 N.C.L. Rev. at 188. In other words, many Americans are ignorant about their legal rights and the legal profession.

Thus, what the members of the public need is more information about their legal rights and the legal profession. Depriving the public of information that could be sent by direct mail simply makes a bad situation worse. Those who will be most injured by *not* receiving this information are the least privileged members of our society who will continue to suffer due to their ignorance of their legal rights. *See* Maute, *supra* p. 19, at 533; and *Ohralik*, 475 U. S. at 466 (Marshall, J., dissenting).



**E. In Some Cases, Targeted Direct Mail Advertising Is The Only Effective Way To Protect Fully Consumer Legal Rights.**

For strategic reasons an attorney wishing to bring a claim on behalf of a group of clients may not wish to announce in a newspaper advertisement that he or she is in the process of preparing for litigation. The attorney may fear that a potential defendant would destroy documents,[27] or take steps to settle unfairly with potential claimants,[28] if the defendant learns that an action is being prepared. Targeted direct mail advertising, however, can be sent to consumers without forewarning potential defendants.

## CONCLUSION

This case is not to be decided upon a clean slate. Nor does this case address an issue not previously considered by the Justices of this Court. As this Court held in *Zauderer*:

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[27]This is not a hypothetical problem. In securities cases, fear of document destruction often causes the government to seek a restraining order prohibiting document destruction at the outset of litigation. *See, e.g., Commodity Futures Trading Commission* v. *Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669 (S.D.N.Y. 1979), and *Securities and Exchange Commission* v. *Jet Travel Services, Inc.*, Fed. Sec. L. Rep. 95317 (M.D. Fla. 1975).

[28]*See Ohralik*, 436 U. S. at 459 n.16.

> An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

471 U. S. at 647. The targeted direct mail issue was considered by at least one member of this Court in deciding *Zauderer*. In her dissent, Justice O'Connor asserted that the *Zauderer* rule would encourage lawyers to provide targeted direct mail advice. *Id.* at 678-79. In so doing, Justice O'Connor referred to the letter sent to accident victims in *In re Von Wiegen*, 470 N. E. 2d 838.

Contrary to well accepted legal principles, the Kentucky Supreme Court has simply ignored the explicit holdings of *Zauderer* and *R.M.J.* In a similar fashion, the regulators of the legal profession in many states have continued to impede the First Amendment rights of attorneys with seeming impunity and without even admitting the existence of this Court's clear and broad holdings.[29] "One commentator noted that the majority

[29]The state supreme court holdings in *R.M.J.* and *Shapero* are two such decisions. In *R.M.J.* the Missouri Supreme Court flatly refused to apply the analytical strictures required by *Bates* and *Central Hudson Gas*, stating: "We respectfully decline to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justices of the United States Supreme Court." *In re R.M.J.*, 609 S. W. 2d 411, 412 (Mo. 1981), *rev'd*, 455 U. S. 191 (1982). (Emphasis supplied.)

Likewise, the Kentucky Supreme Court in its decision limited *Zauderer* to its facts and simply refused to apply the mandate in *Zauderer* that unsupported suppositions not take the place of cold

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> of the post-*Bates* amendments of [the advertising rules] amounted to 'unprecedented attempts to regulate speech that the state knows is protected or could be protected 'by the U. S. Constitution' and that the actions of these courts in continuing restrictions on advertising were attempts bordering on judicial civil disobedience.' " Bolen, *supra* p. 33, at 555.

Accordingly, having been given a decade to adjust, state regulators of attorney advertising should now be told that any form of advertising or solicitation which does not involve in-person, clearly overreaching conduct, may not be prohibited unless it is false, misleading or deceptive, period.

The decision of the Kentucky Supreme Court should be reversed and ABA Rule 7.3 should be declared unconstitutional.

Respectfully submitted,

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hard evidence in assessing the propriety of blanket censorship. Compare *Shapero*, 726 S. W. 2d at 301 ("It is *entirely possible* that the potential client may feel overwhelmed.") (emphasis supplied), with *Zauderer*, 471 U. S. at 648 ("The State's arguments amount to little more than unsupported assertions").

# RESPONDENT'S

# BRIEF

No. 87-16

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

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RICHARD D. SHAPERO - - - - Petitioner

*versus*

KENTUCKY BAR ASSOCIATION - - Respondent

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On Writ of Certiorari to the Supreme Court of Kentucky

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## BRIEF FOR RESPONDENT

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EDITOR'S NOTE

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## QUESTIONS PRESENTED

1. Whether the writ should be dismissed or the judgment below should be affirmed because Petitioner did not present to the Supreme Court of Kentucky for its consideration the objections to the adoption by that Court of Model Rule 7.3 which he is here presenting to this Court.

2. Whether the judgment below should be affirmed because the form of letter Petitioner desires to use is not such as the Supreme Court of Kentucky can be required to approve even if approval of targeted direct mail solicitation for pecuniary gain were required as a constitutional right, and being fatally flawed it cannot sustain a constitutional challenge, overbreadth analysis being inapplicable to commercial speech.

3. Whether the judgment should be affirmed because the Supreme Court of Kentucky, without violating the First or Fourteenth Amendment, may prohibit the use by members of the Kentucky Bar of targeted direct letters of solicitation for pecuniary gain, the Court having determined that the dangers from direct solicitation by lawyers result whether the solicitation be in person or by mail.

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No. 87-16

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

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RICHARD D. SHAPERO - - - - - *Petitioner*

*v.*

KENTUCKY BAR ASSOCIATION - - - *Respondent*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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## BRIEF FOR RESPONDENT

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## CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 116 of the Constitution of Kentucky, which reads as follows:

> The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

## STATEMENT OF THE CASE

The events which brought this case to this Court are as follows:

Kentucky has an integrated or unitary Bar, so that all those admitted to the practice of law in Kentucky are members of the Kentucky Bar Association. Please see Ken-

tucky Supreme Court Rule (SCR) 3.030 which appears at Appendix 20a in Respondent's Brief in Opposition. The relevant rules of the Supreme Court of Kentucky are to be found in that Appendix, and we will hereafter refer simply to the rule involved without mentioning the Appendix.

SCR 3.070 states that the Board of Governors of the Kentucky Bar Association is "the agent of the Court for the purpose of administering and enforcing the Rules". Actions by the Kentucky Bar Association are recommendatory in nature, the Supreme Court of Kentucky being the body which makes the final determination.

SCR 3.135 makes provision for an Attorneys Advertising Commission. Decisions of the commission, after appeal to the Board of Governors of the Kentucky Bar Association, are subject to review by the Supreme Court of Kentucky. SCR 3.135(8).

Following the decision of this Court in *Zauderer* v. *Office of Disciplinary Counsel,* 471 U. S. 626 (decided May 28, 1985), in which this Court affirmed the right of attorneys to solicit business through newspaper advertising, Petitioner, whom we shall call Shapero, on July 12, 1985, addressed a letter to the Advertising Commission through the Director of the Kentucky Bar Association enclosing "a sample letter I propose to send to potential clients who have had a foreclosure suit filed against them". The letter of July 12, 1985 may be found at page 1 of the Appendix to Shapero's Brief filed in the Supreme Court of Kentucky on July 8, 1986, item #5 on page ii of the Joint Appendix.*

*The Joint Appendix contains only a chronological list of relevant docket entries and references to three documents reproduced in the Appendix to the Petition for Certiorari. The original record must be consulted for the other documents.



The letter which Shapero proposed to send to those who had had foreclosure suits filed against them is the one set out on pages 3 and 4 of his brief herein, except that the words which he shows in capital letters were also underscored in the document submitted to the Advertising Commission.

In its decision dated September 19, 1985, which is Exhibit A to the Brief of the Kentucky Bar Association filed August 5, 1986, in the Supreme Court of Kentucky (J.A. p. ii, item #6), the Advertising Commission held that it had no choice but to disapprove the proposed advertising because it violated existing rules. However, the Advertising Commission recommended that the advertising rules be amended so that SCR 3.135(5)(b)(i) is deleted. (Shapero is in error when he states on page 4 of his brief that the Advertising Commission concluded that SCR 3.135(6)(a)(ii) should be deleted, that section of the rules not being involved in the controversy.)

Although the ruling of the Advertising Commission could have been appealed by Shapero to the Board of Governors of the Kentucky Bar Association and then to the Supreme Court of Kentucky, as provided in SCR 3.135(8), Shapero did not pursue those appeals. Instead, pursuant to SCR 3.530(1), Shapero requested an advisory opinion as to the propriety of the use by him of the proposed letter to potential clients. SCR 3.530 provides that the Ethics Committee may furnish to the petitioner a written *informal* opinion on the propriety of the act or course of conduct in question or it may request the Board of Governors of the Kentucky Bar Association to pass upon the question. The Board may, if it deems a question of sufficient importance, issue and furnish the opinion prepared by the Ethics Committee, or as modified by the Board, as a *formal* opinion

of the Board. Three-fourths of the voting members present must concur. In the case at bar, the advisory opinion was issued by the Board as its formal Opinion E-310. It is to be found as Exhibit A to Petitioner's Motion of April 29, 1986 (J.A. p. ii, item #1).

The Board's opinion E-310 dealt not alone with Shapero's inquiry. It addressed as well the question of targeted direct mail advertising to potential tort plaintiffs and said that such target individuals can be readily identified in a perusal of the daily newspapers. It held that such letters cannot be sent. The Board considered the existing Kentucky advertising rule, along with ABA Model Rules 7.1, 7.2 and 7.3, which were then under review by a Special Committee of the Kentucky Bar Association. Pointing out that the Model Rules, like SCR 3.135, "permit truthful, non-misleading advertising", it went on to observe that Model Rule 7.3 still prohibits solicitation for pecuniary gain. The Board therefore concluded that ABA Model Rule 7.3 is consistent with SCR 3.135 and that, in addition, the standards of the Model Rules can be reconciled with the decision of the Supreme Court of Kentucky in *Kentucky Bar Association* v. *Stuart,* 568 S.W. 2d 933 (1978), "which 'approved' an attorney's mailings to commercial businesses, which were not inspired by a particular event."

On April 29, 1986, Shapero filed in the Supreme Court of Kentucky his motion for review of KBA Advisory Opinion E-310 (J.A. p. ii, item #1). In his prayer, Shapero requested the Court to review the opinion "to determine that SCR 3.135(5)(b)(i) is violative of the First and Fourteenth Amendments to the United States Constitution in view of the holding by the United States Supreme



Court in *Zauderer* v. *Office of Disciplinary Counsel, supra,* and to declare this rule void."

The question was fully briefed by both parties, and oral argument was heard by the Supreme Court of Kentucky on August 28, 1986 (J.A. p. ii, item #8). On November 26, 1986, the Supreme Court of Kentucky handed down its opinion, here under review, in which it affirmed Opinion E-310 of the Board of Governors (which it referred to as "the decision of the Ethics Committee"). The Court promptly concluded that SCR 3.135(5)(b)(i) should be deleted, a view it thereafter twice reiterated in the opinion. This action was precisely the relief which Shapero had sought, although Shapero had used slightly different language in the prayer of his motion, namely, that the Court "declare this rule void".

The Court pointed out that in *Zauderer,* this Court had determined that lawyer advertising is a form of commercial free speech protected by the First Amendment and that advertising by attorneys may not be subjected to blanket suppression. The Court then turned its attention to the matter of solicitation (as distinguished from advertising), and stated (page 4 of the Opinion) that "The crux of the matter is whether the state has a substantial governmental interest that is directly served by prohibiting solicitation by direct targeted mailing sent to potential clients known to have a specific legal problem and whether the targeted direct mail may be prohibited because it is improper solicitation and the rule is in proportion to the government interest served". Examining that question and citing this Court's decisions in *In Re Primus,* 436 U. S. 412 (1978) and *Zauderer,* the Court stated (page 5) that it "is not unmindful of the serious potential for abuse inherent in

direct solicitation by lawyers of potential clients known to need specific legal services". It pointed out (page 6) that the potential client may feel "overwhelmed by the basic situation which caused the need for the specific legal services" and that the potential client "may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest". Such a condition, the Court said (page 6), "is full of the possibility of undue influence, overreaching and intimidation".

The Court stated that as provided in the ABA Model Rules, as well as the current Kentucky Rules, "advertising makes it possible for a potential client to be informed about the need for legal services and about the qualifications of available lawyers without subjecting them to direct personal pressure" (page 6). It stated that the use of "general advertising as distinguished from direct private contact tends to assure that information is presented without intimidation" (page 6).

The Court specifically addressed the question of whether prior submission (to the Advertising Commission) of proposed letters of solicitation would provide adequate protection and concluded that it would not. The Court said (page 6): "We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." It concluded that "Such dangers result from direct solicitation whether in person or by mail," and that general mailings not addressed to a specific situation do not have the same danger for abuse as direct targeted mailing (page 6).

The Court therefore concluded that Model Rule 7.3 is an appropriate rule, and it adopted that rule "as the law of this Commonwealth" (J.A.p.ii, items #9 and #14).



Model Rule 7.3 forbids lawyers from soliciting professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, whether the solicitation be by mail, in person, or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The rule defines "solicit" as including contact in person, by telephone or telegraph, by letter, or other writing, or by other communication directed to a specific recipient. It states that "solicit" does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Shapero, on December 16, 1986, filed a petition for modification or extension of the opinion (J.A.p.ii, item #10) to make it clear that Model Rule 7.3 was adopted "as the law in this Commonwealth." The petition was granted on March 27, 1987 (J.A.p.ii, item #14). Shapero did not seek reconsideration or rehearing or initiate a new proceeding for review of Rule 7.3. Instead, he filed his petition for certiorari in this Court on June 26, 1987, and certiorari was granted on October 5, 1987.

## SUMMARY OF ARGUMENT

1. In his motion for review, and in his brief, filed with the Supreme Court of Kentucky, Shapero requested the Court to determine that its Rule SCR 3.135(5)(b)(i) relating to advertising was violative of the First and Fourteenth Amendments and should be declared void. The decision of the Kentucky Court was that the rule should be deleted. At the same time, the Kentucky Court adopted for

use in Kentucky ABA Model Rule 7.3 forbidding a lawyer to solicit professional employment from a prospective client (not of his family or a prior client) by mail, in person or otherwise when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Shapero made no complaint to the Kentucky Court about adoption of Rule 7.3, whether by request for reconsideration or rehearing or through the initiation of a new proceeding for review of Rule 7.3. Instead, he proceeded to file his petition for certiorari in this Court presenting his objections to the new rule. His objections not having been presented to the Court below for its consideration, this Court lacks jurisdiction to consider them in this case. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969), and the numerous cases therein cited. Moreover, the jurisdictional question aside, there are sound reasons for this Court to refuse to pass upon questions not presented to the Court below: There is no record on Shapero's objections for this Court to review, and state courts should be given the first opportunity to pass upon objections to their rules. Further, the doctrine of abstention as announced in *Younger* v. *Harris,* 401 U. S. 37 (1971), likewise forbids the consideration by this Court of questions not considered below and not presented for consideration below. This is particularly true when an attack is made on the disciplinary rules of a state court. The state court should have the first opportunity to pass upon such objections. *Middlesex Ethics Committee* v. *Garden State Bar Association,* 457 U. S. 423 (1982).

2. In order to have the right to challenge in this Court a rule forbidding targeted direct mail solicitation of employment by a lawyer for his pecuniary gain, Shapero must present for this Court's consideration a solicitation letter



which the Supreme Court of Kentucky can be required to approve as a matter of constitutional right. At best, Shapero's constitutional right can be no greater than to engage in benign commercial solicitation. Marshall, J., concurring in *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447 (1978), at 472, note 3. Shapero's letter of solicitation is not such a letter. Therefore, the foundation for a ruling by this Court is missing, since Shapero cannot invoke the overbreadth doctrine with regard to mere commercial speech. *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), at 380; *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447 (1978), at 462, note 20; and *Friedman* v. *Rogers,* 440 U.S. 1 (1979), at 10, note 9.

3. The Supreme Court of Kentucky having ruled that dangers, which it described, result from direct solicitation by lawyers of employment for pecuniary gain, whether the solicitation be in person or by mail, that Court may constitutionally prohibit the use by members of the Kentucky Bar of targeted direct letters of solicitation of employment for pecuniary gain. *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447 (1978).

The law is a profession, not a trade, and a State's highest court has the right to impose reasonable restrictions on members of its Bar in connection with the maintenance of proper standards of conduct by members of the Bar. Involved here is naked commercial speech, unaccompanied by any associational or political rights. The Kentucky Court enunciated sound reasons why the State's legitimate interests for proper conduct by members of its Bar require that targeted direct mail solicitation by lawyers of employment for pecuniary gain be prohibited.

The Kentucky Court does not challenge the right of its lawyers to advertise, and it has been in the forefront in approving, in addition to the use of other forms of advertising, the use of advertising letters. *Kentucky Bar Association* v. *Stuart,* Ky., 568 S. W. 2d 933 (1978). The Kentucky Court's action in the case at bar is consistent with its action in a contrasting case decided in 1972 where it condemned letters of solicitation as distinguished from advertising. *Kentucky State Bar Association* v. *Stivers,* Ky., 475 S. W. 2d 900 (1972). Cases from the highest courts of other states (Kansas, Louisiana, Indiana and Florida) which are cited in this brief are consistent with the action of the Kentucky Court in forbidding targeted direct mail solicitation by lawyers of employment for pecuniary gain.

Shapero's objections stem mainly from his failure to recognize the distinction between advertising and solicitation. The danger inherent in allowing targeted direct letter solicitation is exemplified by the decision in *Adams* v. *Attorney Registration & Disciplinary Commission,* 617 F. Supp. 449 (N.D. Ill. 1985), *affirmed* 801 F. 2d 968 (7th Cir. 1986), where neither the District Court nor the appellate court condemned the dispatch by a lawyer of a telegram soliciting employment which was received by the family two hours after the death of a train-truck accident victim, the lawyer having falsely represented that he had done other work for the victim. *Adams* is *Ohralik* in writing.



## ARGUMENT

### 1. The Writ Should Be Dismissed or the Judgment Below Should Be Affirmed Because the Supreme Court of Kentucky Gave Shapero Precisely the Relief He Sought and Shapero Made No Complaint to the Court About Its Adoption of Model Rule 7.3.

This case is an anomaly in that the Supreme Court of Kentucky granted Shapero precisely the relief which he requested and yet he sought, and this Court granted, review of the decision below. It is true that the court below gave Shapero more than he asked for when it not only deleted from its rules SCR 3.135(5)(b)(i) but also adopted ABA Model Rule 7.3; but Shapero uttered not one word of protest to the Supreme Court of Kentucky concerning the adoption of the new rule, nor did he ask the Court for reconsideration or rehearing, a remedy which certainly could not have escaped his attention since he did file a petition for modification or extension of the opinion and his petition was granted (J.A.p.ii, item #14).

To be more explicit on this point, we begin by quoting the first words which appear on the first page, under the heading "Introduction," of Shapero's brief to the Supreme Court of Kentucky on review of Advisory Opinion E-310 (J.A.p.ii, item #5):

> This is a petition for review of SCR 3.135(5)(b)(i) which prohibits targeted direct mail advertising by lawyers.

In the prayer of his motion for review (J.A.p.ii, item #1), Shapero requested the Court to review Advisory Opinion E-310 "to determine that SCR 3.135(5)(b)(i) is violative of the First and Fourteenth Amendments to the United States Constitution . . . and to declare this rule void." He did not

request review of his proposed solicitation letter which the Board of Governors of the Kentucky Bar Association had found could not be sent because of the existing rule. The relief he wanted was to get rid of SCR 3.135(5)(b)(i), and that is precisely the relief which the Supreme Court of Kentucky granted him. On page 3 of its Opinion (J.A. p. ii, item #9), the Supreme Court of Kentucky held that the rule "should be deleted." On page 4 it stated that "In view of the language of the rule as it is presently written, we are compelled by the decision in *Zauderer* to order the rule deleted." And the next paragraph contains the Court's formal ruling: "It is the decision of this Court that Supreme Court Rule 3.135(5)(b)(i) be deleted."

Having won the relief he sought, why then did Shapero seek review by this Court? The answer is easily found: because the Court adopted Model Rule 7.3 prohibiting targeted direct mail *solicitation* by lawyers of persons with whom the lawyer has had no prior family or professional relationship, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Shapero, throughout his filings in this Court, speaks of the new rule as prohibiting targeted direct mail "advertising." Please see, *e.g.*, the Petition for Certiorari at page 7; the Brief for Petitioner on the page containing "Question Presented," page 6, the headings for arguments II and III on pages 22 and 26, and heading A on page 32. But as even a cursory reading of Model Rule 7.3 will show, the rule prohibits only described forms of solicitation and expressly provides that the term "solicit" does not include letters addressed or advertising circulars distributed generally as in the rule stated. There is not the slightest suggestion or hint in the rule that there is any prohibition against newspaper or



radio or television advertising. The prohibition is of solicitation as described in the rule. It does not prohibit targeted direct mail *advertising*. Shapero wants to engage in targeted direct mail *solicitation*.

As of this writing, Shapero has not said one word to the Supreme Court of Kentucky complaining about the adoption of Model Rule 7.3. Instead, he has addressed to this Court some 47 pages of brief setting out why the rule is, according to his beliefs, objectionable. Shapero is addressing the wrong Court. He should have addressed the Supreme Court of Kentucky and then, if it did not agree with him, it would have been time enough for him to seek review by this Court. But the Supreme Court of Kentucky should have had the opportunity to hear, consider and act upon his objections.

There are a multitude of cases from this Court stating the general rule to be that this Court does not consider questions not considered in the lower court. The rule is especially stringent when review by this Court is of a state court decision. Indeed, in such a situation this Court *lacks jurisdiction* to consider complaints against actions by a state court when those objections have not first been addressed to the state court.

Perhaps no case better states the rule than does *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). Louisiana had a statute which required that confessions used at a trial be admitted in their entirety. Cardinale's confession in its entirety was introduced in a murder trial, and he was convicted and sentenced to death. This Court granted certiorari to the Supreme Court of Louisiana to consider whether the Louisiana statute was unconstitutional. In oral argument before this Court, it was developed that the

sole federal question being argued to this Court had never been raised, preserved or passed upon in the state courts below. This Court therefore dismissed the writ for want of jurisdiction. Explaining its action, the Court said (page 438):

> . . . It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, § 25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet 368, 391, 9 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e. g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v. Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v. California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v. Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875).

The Court further explained that, the jurisdiction question aside, there are sound reasons for refusing to pass upon



questions not presented to the court below. It said (page 439):

> . . . Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them.

The rule is less stringent, perhaps not jurisdictional, when review by this Court is of a decision by a federal court below, but even there this Court ordinarily will not pass upon a question not presented below. In *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346 (1981), where the review was by certiorari to the Seventh Circuit, the Court ruled (page 362):

> Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us. We therefore affirm the judgment of the Court of Appeals.

In *Lawn* v. *United States,* 355 U.S. 339 (1958), at 337, note 16, another federal case, this Court refused to pass upon an issue which was not raised in the Second Circuit saying that "Only in exceptional cases will this Court review a question not raised in the court below" and that "There are

no exceptional circumstances here." To like effect are *United States* v. *Ortiz,* 422 U.S. 891 (1975), at 898; *Ramsey* v. *United Mine Workers,* 401 U.S. 302 (1971), at 312; and *United States* v. *Santana,* 427 U.S. 38 (1976), at 41, note 2.

There is an additional rule which equally forbids the consideration by this Court of questions not first presented to a state court for its determination, and that is the doctrine of abstention as announced, especially, in *Younger* v. *Harris,* 401 U.S. 37 (1971), and as particularly applied to a factual situation like unto the one in this case in *Middlesex Ethics Committee* v. *Garden State Bar Association,* 457 U.S. 423 (1982). In *Younger,* in discussing the reasons for the public policy against federal court interference with state court proceedings which has obtained since the beginning of this country's history, the Court referred (page 44) especially to "the notion of 'comity' " and "Our Federalism." Comity it defined (page 44) as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Saying that the concept is also referred to by many as "Our Federalism," the Court said (page 44) that "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts." It went on to say (page 44) that the concept represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and



federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

In *Middlesex,* 457 U.S. 423, earlier mentioned, the Court stated (page 431) that "*Younger* v. *Harris, supra,* and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." The Court further stated (page 431) that "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights" (the Court's emphasis).

In *Middlesex,* New Jersey had a three-tier system for the discipline of attorneys, beginning with the local district Ethics Committee, proceeding through the statewide Disciplinary Review Board but with final action being taken by the New Jersey Supreme Court except in cases of a private reprimand. The local Middlesex County Ethics Committee filed a complaint against Hinds because he had, in a press conference, criticized the trial judge in a murder case for his judicial temperament and racial insensitivity; and Hinds referred to the criminal trial as "a travesty," a "legalized lynching," and "a kangaroo court." Instead of filing an answer to the charges, Hinds filed suit in Federal District Court contending that the disciplinary rules violated his First Amendment rights. He complained also that the disciplinary rules were facially vague and overbroad. On the strength of *Younger* v. *Harris,* the District Court dismissed but the Third Circuit reversed because it thought that the state bar disciplinary proceedings did not provide a meaningful opportunity to adjudicate constitutional claims and it considered the disciplinary proceedings

in the case before it as being unlike the state judicial proceedings to which the federal courts usually defer. Having granted certiorari, this Court reversed the Third Circuit on the strength of *Younger* v. *Harris*. Pointing out (page 432, note 11) that the New Jersey allocation of responsibility for discipline is consistent with the ABA Standards for Lawyer Discipline and Disability Proceedings, which state that the ultimate and exclusive responsibility within a state for discipline matters is within the inherent power of the highest court of the state, the Court found (page 435) it "difficult to conclude that there was no 'adequate opportunity' for respondent Hinds to raise his constitutional claims." Of especial importance is the statement that "it would trivialize the principles of comity and federalism if federal courts fail to take into account that an adequate state forum for all relevant issues has clearly been demonstrated to be available prior to any proceedings on the merits in federal court."

There can be no doubt that disciplinary proceedings, including those relating to advertising, are judicial in nature in Kentucky. As we have pointed out, the rules of the Supreme Court of Kentucky provide for ultimate action by that Court, and in this very case the Court took such action. In *Kentucky Bar Association* v. *Vincent*, Ky., 538 S.W. 2d 39 (1976), the Supreme Court of Kentucky specifically held that its power to prescribe a code of ethics and to establish practice and procedure for disciplining, suspending and disbarring attorneys is inherently a judicial function and does not depend upon statute. Shapero was obliged to make known to the Supreme Court of Kentucky his objections to ABA Model Rule 7.3 which the Court adopted. Shapero could have done so by a request for



reconsideration or rehearing or by initiating a new review proceeding. He did none of these.

Therefore, both on the strength of the rule that this Court will not review matters which were not presented to the state court for its consideration and the rule of abstention as exemplified by *Younger* v. *Harris* and the *Middlesex* case, this Court should affirm the judgment below on the grounds both that it lacks jurisdiction to consider those objections and that the objections are not ripe for this Court's consideration.

**2. Even if Targeted Direct Mail Solicitation Were a Constitutional Right, Shapero's Form of Letter Is Not Such as the Supreme Court of Kentucky Can Be Required to Approve, and Being Fatally Flawed It Cannot Sustain a Constitutional Challenge, Overbreadth Analysis Not Being Applicable to Commercial Speech; Hence, the Judgment Should Be Affirmed.**

The point we here make is that even if Shapero has a constitutional right to make targeted direct mail solicitation to secure, for his pecuniary gain, clients with whom he has not previously had a family or client relationship, the Supreme Court of Kentucky is not required to approve the offensive letter he has proposed; and Shapero's case must stand or fall on the letter he has submitted, since overbreadth analysis is not applicable to commercial speech.

Shapero's proposed letter is not a mere objective statement of Shapero's qualifications as a lawyer, his availability to assist the recipient, and his desire to be hired. As we have said in our Brief in Opposition (page 8), the letter fairly shouts at the recipient and figuratively grasps him by the lapels and tries to convince him that he should employ Shapero. We call attention to the use in the letter of words in underscored capital letters (the underscoring

having been omitted when Shapero set the letter forth in his principal brief at pages 3 and 4).* In the last paragraph, the recipient receives the peremptory command, "Call NOW, don't wait," and this is followed by the enigmatic sentence, "It may surprise you what I may be able to do for you". There is no possible justification for that sentence. It states no affirmative or objective fact. It is pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing.

This is a letter directly seeking legal employment, sent to an individual with a known legal need. It is not advertising. It is solicitation, high pressure solicitation, overbearing solicitation. The gullible recipient is intended to be overwhelmed.

In its opinion herein (J.A.p.ii, item #9) the Supreme Court of Kentucky recited (page 2) that the Advertising Commission did not find that the Shapero letter was false, misleading, or deceptive. It likewise recited (page 4) that the Ethics Committee (actually the Kentucky Bar Association Board) did not determine that the proposed blank-form letter was misleading, potentially misleading, deceptive, or false. But the Court went on to state, correctly, (pages 4–5) that the State has a recognizable governmental interest in regulating members of the professions it licenses and who serve as officers of the courts "which justifies the application of rules to prohibit solicitation that is misleading, overbearing or involves other features of de-

*Compare:* "Somewhat more troubling is appellant's listing, in large capital letters, that he was a member of the Bar of the Supreme Court of the United States. . . . The emphasis of this relatively uninformative fact is at least bad taste. Indeed, such a statement could be misleading to the general public unfamiliar with the requirements of admission to the bar of this Court. . . ." *Re R.M.J.*, 455 U. S. 191 at 205.



ception or improper influence". It held that just as the State may forbid in-person solicitation for pecuniary gain "under circumstances likely to result in those evils", so too "Direct targeted mail to a person with whom the lawyer has no prior relationship should also be prohibited for the same reasons".

It should here be observed that the fact that the Court recited that the Advertising Commission did not find that the letter was false, misleading, or deceptive, and recited that the Ethics Committee (actually the Board of the Kentucky Bar Association) did not find that the letter was misleading, potentially misleading, deceptive, or false does not mean that either body made a contrary finding. Nor does it mean that the Supreme Court of Kentucky made a finding approving the letter. On the contrary, from the fact that the Court determined that the State may enforce rules "to prohibit solicitation that is misleading, overbearing, or involves either features of deception, or improper influence", and from the fact that the Court found that it could prohibit direct targeted solicitation "under circumstances likely to result in those evils", and from the fact that the Court did not approve Shapero's letter, the only conclusion which can be drawn is that the Court held that the use of Shapero's letter was likely to result in the evils of being misleading, overbearing, or of involving other features of deception or improper influence. The Court further found that prior approval of such letters would not provide a suitable protection to the public from overreaching, intimidation, or misleading private targeted mail solicitation.

Shapero's letter being subject to these disabilities, it is clear that his case must fail, for he must stand or fall on the letter he proposed to use. He cannot test the constitutionality of Model Rule 7.3 on the basis of some other

letter he may compose or on some other theoretical basis. This is made clear by a series of cases concerning commercial speech and its limited rights under the First and Fourteenth Amendments.

In this regard, Justice Marshall, concurring in *Ohralik* and favoring approval of certain forms of solicitation, made the point that the only solicitation which could be approved is "benign" solicitation, which he thus defined (436 U.S. 473, note 3):

> By "benign" commercial solicitation, I mean solicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous. . . .

Shapero's proposed letter does not constitute "benign" commecrial solicitation.

Shapero is bound by the letter he has submitted and cannot go beyond it. The applicable rules have been spelled out by this court beginning with *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977). The Court began by stating that the overbreadth doctrine as applied to traditional First Amendment rights, that is, those which existed for the many years which preceded the discovery in 1976 that commercial speech also has limited First Amendment protection, has no application to commercial speech. The court said (page 379-380):

> In the usual case involving a restraint on speech, a showing that the challenged rule served unconstitutionally to suppress speech would end our analysis. In the First Amendment context, the Court has permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that is fact his specific conduct was protected. . . .
>
> The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court. . . .



Stating that since advertising is linked to commercial well-being, the Court said that "it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation". The Court concluded (page 381):

> . . . Since overbreadth has been described by this Court as "strong medicine," which "has been employed . . . sparingly and only as a last resort," Broadrick v. Oklahoma, 413 U. S., at 613, 37 L. Ed. 2d 830, 93 S. Ct. 2908, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. . . .

The doctrine was further developed in *Ohralik,* 436 U. S. at 462, note 20, where Ohralik complained that the rules were so broadly worded as to prohibit both solicitation that is constitutionally protected and solicitation that is not. The Court held that Ohralik could not make a successful overbreadth argument in view of its ruling in *Bates.* The Court went on to say at the reference given above:

> . . . Commercial speech is not as likely to be deterred as noncommercial speech, and therefore does not require the added protection afforded by the overbreadth approach.

Finally, on this point of our argument, in *Friedman* v. *Rogers,* 440 U. S. 1 (1979), at 10, note 9, the Court held

that the application of the First Amendment to commercial speech "has been recognized generally as a substantial extension of traditional free-speech doctrine which poses special problems not presented by other forms of protected speech." The Court went on to say that "while the First Amendment affords such speech 'a limited measure of protection,' it is also true that 'the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity' ". It also said at the same reference that "our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area", and, citing *Ohralik,* stated "overbreadth analysis [is] not applicable to commercial speech."

Since Shapero's proposed letter of *solicitation* is not such as to merit approval even if he has a constitutional right to use *proper* letters of solicitation, the lower court should be affirmed since Shapero cannot broaden the base of his argument through the use of the overbreadth approach.

### 3. The Supreme Court of Kentucky Having Ruled That Dangers Result From Direct Solicitation By Lawyers of Employment for Pecuniary Gain Whether the Solicitation Be in Person or By Mail, the Court May Constitutionally Prohibit the Use By Members of the Kentucky Bar of Targeted Direct Letters of Solicitation for Pecuniary Gain; and the Judgment Below Should Be Affirmed.

#### A. PRELIMINARY STATEMENT

The difference between Shapero, on the one hand, and the Supreme Court of Kentucky and the Kentucky Bar Association, on the other, is that Shapero considers the law to be a trade while the Supreme Court of Kentucky and the Respondent, in keeping with a tradition older than



Anglo-American law, consider the law to be a profession.* That Shapero considers the law to be a mere trade is shown by his characterization (Brief, p. 31) of the American Bar Association as a "trade association", his heavy reliance upon activities of the Federal Trade Commission and its staff agencies, and his argument that targeted direct mail advertising (and presumably Shapero would say the same for targeted direct mail solicitation) reduces prices to consumers and is more cost efficient. If Shapero is but a tradesman seeking to hawk his wares by personal letters of solicitation, he is entitled to win this case. If he is a member of a profession called to the Bar of Kentucky and subject as an officer of the Court to the reasonable regulations of Kentucky's highest court, then he is not.

Of the 55 delegates to the Convention which drafted the Constitution of the United States in 1787, 34 were lawyers. *Milestones: 200 Years of American Law,* by Lieberman, p. 30. It can be affirmed with confidence that those 34 lawyers were not regarded by their fellow citizens as but tradesmen like the ironmonger, the wool merchant and the shipwright. Rather, they were considered to be among the best minds of the community, learned men set apart from the ordinary by their intelligence and their lifetimes of study and service to the law.

Kentucky came into the Union only five years later, in 1792. Nurtured by the same tradition, it has held and now holds the law in high esteem. It has given to this Court

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**Compare* separate opinion of Justice O'Connor, The Chief Justice and Justice Rehnquist in *Zauderer,* 471 U. S. ___, 85 L. Ed. 2d at 652: "Lawyers are *professionals,* (emphasis in opinion) and as such they have greater obligations. As Justice Frankfurter once observed, '[f]rom a profession charged with [constitutional] responsibilities there must be exacted . . . qualities of truth-speaking, of a high sense of honor, of granite discretion.' . . ."

Thomas Todd (in 1807) and Robert Trimble (in 1826), the first John Marshall Harlan (in 1877) and, more recently, Stanley F. Reed and Chief Justice Fred M. Vinson. Louis Dembitz Brandeis was a native son of Kentucky whose ashes lie in honored repose beneath the portico of the Law School of the University of Louisville, and Samuel F. Miller, Horace H. Lurton, James C. McReynolds and Wiley B. Rutledge were all born in Kentucky. None of these Justices is regarded in Kentucky as a tradesman. Each is esteemed as a lawyer who reached the pinnacle of a noble profession.

Those called to the Bar of Kentucky today devote 19 years of their lives to study to secure the right to be *considered* for entry into the profession, a regimen which few would follow if they knew they were to become but peddlers hawking their wares.

Respondent acknowledges that Shapero is not alone in seeking to reduce the law from a profession to a trade. Under date of June 8, 1987, the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission addressed a 24-page, single-spaced letter to the Chief Justice of Kentucky commenting on (among other things) the proposed Kentucky Rules of Professional Conduct, which would be based upon the Model Rules of the ABA. In discussing proposed rule 7.3 (the rule involved in the case at bar) the bureaus went so far as to speak approvingly of the use by a lawyer of "a telephone marketing firm to call all residents of a neighborhood and offer the lawyer's services to write a will". The bureaus stated that by such action "consumers will be provided useful information and the likelihood of harm seems small".

The major question presented by this case is whether this Court will insist upon substituting its judgment for



that of the highest court of Kentucky as to whether or not direct targeted solicitation of business by lawyers, by mail, for pecuniary gain is consonant with the maintenance of proper standards of conduct by members of the practicing Bar of Kentucky. Will this Court, far removed as it is from the daily practice in the various levels of courts in the Kentucky system, where some members of the Bar scrambling to make a living sometimes indulge in practices which are not helpful to society but harmful to it, substitute its judgment for that of the Kentucky court which has the responsibility to society for policing the bar and insuring, as far as may be, that the standards of the bar are maintained and the interests of society served?

We are, in this case, in an area of the law which, prior to 1976, this Court regarded as being without First Amendment protection, an area of the law in which this Court was content to allow the States, as responsible sovereign entitles, to provide such regulation as might be reasonably required. We here refer to the constitutional right which this Court first found to exist in 1976 concerning advertising or "commercial speech". *Virginia Pharmacy Board* v. *Virginia, etc.,* 425 U. S. 748 (1976). This Court was, it seems, subsequently made uncomfortable by its own discovery, for it soon made it clear that although commercial speech is entitled to some measure of protection under the First Amendment, it is not entitled to the same kind of protection accorded to traditional First Amendment rights. *Ohralik,* 436 U. S. 447 at 455-456. Restrictions or limitations can be placed on commercial speech which would not be appropriate for traditional First Amendment rights. *Ohralik* at 456; *Zauderer,* 471 U. S. ____, 85 L. Ed. 2d at 663-664. So we had a second new concept: the newly discovered right of commercial speech was entitled to a dif-

ferent and lower quality of protection than traditional First Amendment rights.

Respondent is not suggesting that in this case the Court should disavow its discovery of 1976. Respondent does suggest that the Court should not push back the frontiers once more and find in this case that the newly-discovered right of commercial speech includes the right of lawyers to seek pecuniarily beneficial employment as lawyers by targeted direct mail solicitation. This question has not been before the Court before. On the one hand, the Court has held that in-person solicitation may properly be proscribed by a State. *Ohralik,* 436 U. S. 447. On the other, it has held that general advertising by lawyers in the newspapers is within the scope of the newly discovered right of commercial speech. *Zauderer,* 471 U. S. 626. But this case lies between those two extremes and concerns targeted direct solicitation by mail.

The Supreme Court of Kentucky found that targeted direct mail solicitation was like unto the in-person solicitation which this Court held in *Ohralik* could properly be prohibited. For Shapero to win this case, this Court must intrude itself into the Kentucky Supreme Court's decision-making. It must say to the Kentucky Court, "Your evaluation on the facts is wrong". It must say, "We will cast out your determination and substitute ours for yours", something appellate courts are loath to do in more mundane cases. This Court must say, "Under no possible circumstances can your determination be right".

The highest courts of the States are competent to perform their functions. As the highest tribunals of sovereign States they are entitled to be treated with respect and their determinations not lightly cast aside.



**B. THERE IS A SOUND BASIS FOR THE ACTION OF THE KENTUCKY SUPREME COURT IN PROHIBITING TARGETED DIRECT MAIL SOLICITATION BY LAWYERS WHEN PECUNIARY GAIN IS A SIGNIFICANT FACTOR, AND THE COURT'S ACTION DOES NOT VIOLATE THE FIRST OR FOURTEENTH AMENDMENT.**

The Supreme Court of Kentucky in its opinion herein (J.A.p.ii, item #9; reproduced at pp. 1a-7a of the Appendix to Respondent's Brief in Opposition) clearly stated the basis for its ruling prohibiting the use by lawyers of targeted direct mail solicitation of employment for pecuniary gain. It stated (6a-7a):

*First,* "advertising" as distinguished from solicitation "makes it possible for a potential client to be informed about the need for legal services and about the qualification of available lawyers without subjecting them to direct personal pressure."

*Second,* "The use of general advertising as distinguished from direct private contact tends to assure that information is presented without intimidation."

*Third,* "We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation."

*Fourth,* "Such dangers result from direct solicitation whether in person or by mail."

*Fifth,* "General mailings not addressed to a specific situation do not have the same danger for abuse as direct targeted mailing."

It is of the greatest importance that notice be taken of the clear and careful distinction which the Kentucky Court made between advertising and solicitation, a distinction

which Shapero refuses to recognize and has constantly sought to obscure in his filings with this Court. The Kentucky Court has no quarrel with the use of advertising. The Kentucky Court has been in the forefront in approving the use of advertising by lawyers. Under its advertising rule, SCR 3.135, Kentucky lawyers advertise in newspapers, in the yellow pages of telephone books, on television and on radio. Moreover, the Court has approved the use of direct mail advertising to those likely to need particular legal services; but it has drawn the line at solicitation.

As we did in our Brief in Opposition, we call attention to *Kentucky Bar Association* v. *Stuart,* Ky., 568 S. W. 2d 933 (1978), reproduced beginning at Appendix 8a to our Brief in Opposition. Decided after *Ohralik, Primus* and *Bates,* all of which the Court cited, the Court approved a form of letter addressed to two real estate agencies calling attention to the fact that the lawyers sending the letter handle the legal aspects of real estate transactions, stating the charges for identified services, and making certain guarantees about service. No solicitation of business was made, the letter ending with expressions of thanks for the recipients' time and consideration. The Supreme Court of Kentucky held that this was not a letter of solicitation (p. 934): "The letters contain no words generally associated with solicitation."

Earlier, with perfect consistency with *Stuart* and in sharp contrast with it, Kentucky's highest court (then called the Court of Appeals) decided *Kentucky State Bar Association* v. *Stivers,* Ky., 475 S. W. 2d 900 (1972), a case which this Court refused to review, certiorari being denied in 406 U.S. 968. Stivers wrote six or seven letters of solicitation, not advertising, to persons shown by the local newspaper to have been involved in automobile accidents. In a representative letter, he stated that he handled cases of that sort and was in position to represent the addressee. He invited the addressee to call him if he could be of service. The Court considered the letters to be letters soliciting employment for the purpose of instituting litigation, and Stivers was suspended from the practice of law for the period of one year.



We turn our attention to the Court's third reason for prohibiting direct targeted mail solicitation for pecuniary gain, namely, the Court's belief that submission of a blank form letter to the Advertising Commission does not provide suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation. In so concluding, the Kentucky Court was in agreement with the views of the House of Delegates of the American Bar Association, as expressed in their "Comments" to the Model Rules of Professional Conduct adopted by the House of Delegates in August, 1983. Please see ABA/BNA Lawyers Manual on Professional Conduct, Volume 1, page :168. At that reference the House of Delegates stated in its Comment to Rule 7.3:

> These dangers attend direct solicitation whether in-person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition. . . . Another suggestion is that solicitation letters be filed with a state regulatory agency. This would be ineffective as a practical matter. State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything

about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading. . . .

In so concluding, the Kentucky Court was not rubberstamping the action of the House of Delegates of the ABA. As set out in Volume 9 of Baldwin's Kentucky Revised Statutes Annotated, the ABA adopted the Code of Professional Responsibility in 1969, but the Code was not recognized by Kentucky's highest court until 1971. Again, as shown in the ABA/BNA publication at p. 01:101, the Model Rules of Professional Conduct were adopted by the House of Delegates of the ABA in August, 1983, and the Kentucky Court has not yet adopted the Model Rules except for Rule 7.3 involved in this case. So the action of the Kentucky Court was its own action and in no sense the automatic approval of something done by the ABA.

The Kentucky Court's fourth reason for prohibiting targeted direct mail solicitation, namely, that the dangers resulting from direct solicitation occur whether the solicitation is in person or by mail, echoes a reason given by the ABA House of Delegates in its 1983 Comment (p. 01:168 of the ABA/BNA Publication). The reason is as valid in 1987 as it was in 1983. Worthy of particular note in this regard is the decision of the Supreme Court of Kansas in *State* v. *Moses*, Kan., 642 P. 2d 1004 (1982), where Moses, a member of the bar, sent out letters to approximately 150 persons whose names he had gathered from the Realtors Multiple Listing. Moses urged the addressees to sell their homes "by owner," using him and his 33 years of experience for a fee of $300. First reviewing this Court's holdings in *Bates*, *R.M.J.* and *Ohralik*, as well as decisions of other



courts, the Kansas Court concluded that the prohibition of solicitation is not invalid under the First Amendment. The Court wrote (p. 1007):

> It is argued that direct solicitation is nothing more than other forms of advertising protected by the First Amendment. The distinction between advertising, which may not be prohibited, and direct solicitation, which may, is a fine one but we are convinced such a distinction is justified. Traditionally, the prohibition against direct solicitation has been directed to the evils inherent in 'ambulance chasing' and the detriment members of the public may suffer by such solicitation.
>
> The solicitation in the instant case, while not being of the nature of ambulance chasing and hospital room solicitation, nevertheless is directed to a segment of the public which, under present economic conditions, is extremely vulnerable to a suggestion of employment that may or may not be advantageous to the individual homeowner. We are of the opinion that the concept of the regulation and restriction of personal solicitation is one which is not only viable but works to the benefit of the general public and to the fair administration of justice. . . .

In an extensive opinion the Supreme Court of Louisiana reached similar conclusions in *Allison* v. *Louisiana State Bar Association*, La., 362 So. 2d 489 (1978). Allison, a member of the bar, and others sought to enjoin the Louisiana State Bar Association from enforcing disciplinary rules which prohibited the soliciting, marketing and providing of prepaid legal services offered by Allison and the other petitioners to various business groups. Distinguishing this Court's decision in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, *Trainmen* v. *Virginia*, 377 U.S. 1, *United Mine Workers* v. *Illinois, etc.*, 389 U.S. 217, and *Bates*, 433 U.S. 350, the

Court relied upon *Ohralik*, 436 U.S. 447, and *In Re Primus*, 436 U.S. 412. It rejected petitioners' demands and dismissed their petition, saying (p. 496):

> Petitioners did not engage in face-to-face solicitation with would-be clients, as did Ohralik. They wrote an employer, soliciting the formation of a contract under which the employer collected money from wages and sent it to petitioners, who promised to perform specified legal services for those who paid. The solicitation by mail was not fraught with as many undesirable possibilities as face-to-face solicitation, but it was direct solicitation, nevertheless. And because the offer was privately made, and not in the public domain like the advertising approved in the *Bates* case, for all to see, it would be more difficult to regulate to prevent abuses which are legitimate subjects of state regulation, in spite of some First Amendment involvement (but less difficult to regulate than face-to-face solicitation—see *Primus*).
>
> . . . . .
>
> . . . Since we interpret petitioners' actions as direct solicitation for pecuniary gain, and since we find the State's traditional and important regulation of the practice of law by prohibiting solicitation would have no adverse impact upon constitutional rights (except the lawyer's own right to speak as he pleases in commercial solicitation) the prohibition against direct solicitation by lawyers for pecuniary gain will be upheld.

A third case which is similar is *In the Matter of James J. Frank*, Ind., 440 N. E. 2d 677 (1982), from the Supreme Court of Indiana. Frank received a public reprimand for letters of solicitation which he wrote to approximately 20 persons whose names he obtained from court records as being persons charged with driving under the influence of



alcohol and for whom no attorney had entered an appearance of record. In the letters Frank stated his successful experience in plea-bargaining such cases and his fee for the service. He encouraged the defendants to retain their own attorney if they had one, and in some of the letters listed the names of other attorneys who handled this kind of cases. The Court, in issuing a public reprimand to Frank, found that his letters were letters of solicitation and not of advertising, saying (p. 677):

> The facts in this case establish that Respondent set out purposely to obtain the names of persons who needed representation and to solicit their business by recommending himself. The public does benefit by information which may aid them in recognizing their legal problem and selecting a lawyer. However, the manner and substance of Respondent's solicitation goes far beyond the information limitation. The Respondent's conduct serves to unduly influence the legally unsophisticated persons into believing that the Respondent could and would get a favorable resolution of their case and to persuade them to retain Respondent. Such conduct is detrimental to the public and offensive to our system of justice.

No case better weighs the arguments for and against mail solicitation by lawyers than does *The Florida Bar* v. *Schreiber*, Fla., 407 So. 2d 595 (1982). The Florida Bar charged Schreiber with violations of its disciplinary rules for having dispatched a letter to a company in which he advised that should it encounter immigration problems in which were needed the services of reputable immigration attorneys specializing in Immigration and Naturalization Law, the addressee should feel free to contact Schreiber, who stated that it would be his pleasure to be of service.

The judicial referee granted dismissal of the complaint on the ground that Schreiber's actions were not in-person solicitation and could not be prohibited because they were protected under the federal and state constitutions. The Florida Supreme Court reversed and remanded for further proceedings. In doing so, it stated (p. 596) that "Solicitation involving legal services has been supported only in Supreme Court cases in which either political or associational rights were implicated, and the pecuniary motive was subdued." The Court held that Schreiber's conduct was not protected under the *Primus* decision, 436 U.S. 412. The Court further held (p. 596) that Schreiber's letter did not warrant protection on the grounds of its informational value and social utility since the information contained in the letter could be made readily available through various media sources for any citizen who desired it. It held (p. 597) that the letter was not "a permissible advertisement protected under the dictates of *Bates*," 433 U.S. 350. It found (p. 598) that some degree of the harms found in *Ohralik*, 436 U.S. 447, "exists in direct mail solicitation," and found "the reasoning of *Ohralik* more applicable to our problem than that of *Primus*." The Court found (p. 598) that "The problems with direct mail solicitation are more akin to those of door-to-door canvassing than to those of newspaper advertising." It went on to say (p. 599) that "Although the problems of overreaching and undue influence through direct mail solicitation are obviously less critical than those involved with in-person solicitation, such dangers are clearly enhanced in comparison with public advertising." At the same reference it said that "Because a letter can be specifically targeted, appealing to a certain person's known or calculated weaknesses, danger of overreaching cannot be totally dismissed."



In *Dayton Bar Association* v. *Herzog*, Ohio, 436 N.E. 2d 1037 (1982), one charge against Herzog was that he mailed between 500 and 1,000 letters to defendants in cases in Dayton Municipal Court which were listed in the "Daily Court Reporter." Two different forms of letter were used, but each referred to a "new federal law" as a means of forestalling collections and invited the recipients to call respondent's office for an appointment. The Ohio Supreme Court held (p. 1038) that "This patent solicitation is not the type of constitutionally protected commercial speech discussed in *Bates* v. *State Bar of Arizona*, (1977), 433 U.S. 350 . . . .". The Court held that respondent's letters created a potential for overreaching and a need for prophylactic regulation in furtherance of the State's interest in protecting the lay public, as held in *Ohralik*.

We submit that these views of the highest courts of the states involved, courts which must grapple with the problem of discipline for members of the bar, are entitled to the greatest weight in the considerations of this Court and should be followed.

### C. COMMENTS ON AND ANSWERS TO SHAPERO'S ARGUMENTS.

Throughout the argument sections of his brief, Shapero argues a case which is not before this Court. He argues that targeted direct mail *advertising* is constitutionally protected. He neglects the issue before this Court, namely, that targeted direct mail *solicitation* by lawyers of employment for pecuniary gain is not constitutionally protected. He regularly confuses the concept of solicitation as being identical with that of advertising.

At p. 17, Shapero cites *Adams* v. *Attorney Registration & Disciplinary Commission*, 801 F. 2d 968 (7th Cir. 1986),

a case worthy of this Court's close scrutiny but not for the reason advanced by Shapero. *Adams* is weak authority for Shapero, first, because like Shapero it speaks of letter solicitation as advertising; secondly, because it was decided on appeal from the grant of a *preliminary* injunction and the appellate court explained (p. 971) that the test was whether there was an abuse of discretion by the court below and that "This standard of review is extremely deferential"; and, third, the individual plaintiffs, six in number, had for some period of time been dispatching their targeted letters of solicitation before the Attorney Registration & Disciplinary Commission adopted a new rule which forbade targeted direct mailings. So the issue was the maintenance of the *status quo*, the usual issue in a preliminary injunction proceeding.

The most important part of *Adams* for this Court is its ruling-by-failing-to-rule—its ruling which, if not swept under the rug, can be correctly said to have been hidden in the footnotes. At p. 974 of the 7th Circuit opinion, footnote 3 reads:

> The court below indicated that certain individual representations made in the direct mailings at issue here might be misleading and therefore subject to regulation even if a direct ban were impermissible. *See Adams* v. *ARDC*, 617 F. Supp. 449, 454 n.2 (N.D. Ill. 1985).

When one looks at footnote 2 on p. 454 of the District Court opinion, one finds the following language:

> Defendants have submitted one written communication which moves closer to the kind of solicitation prohibited by the Court in *Ohralik*. The communication was a telegram received by the family two hours after the death of a train-truck accident victim. The telegram stated, "Extremely sorry to hear about accident regarding. . . . Please contact our law office if we can be of help to you as we have been in the past." When the family called the attorney he could not remember the name of the victim, let alone any work he had done for the victim. However, the attorney was more than willing to discuss the possibility of a personal injury suit. Although a telegram cannot exert the same kind of pressure on vulnerable people that in-person solicitation can, it is not unreasonable to assume that the recipient of such a letter would feel obligated to answer. A ban of this type of communication might not be unconstitutional.



The remarkable thing is that the District Court did not act to condemn this offensive letter of solicitation and that the appellate court also failed to act. The District Court contented itself with a statement about as weak as can be imagined, that "A ban of this type of communication might not be unconstitutional"; and then the appellate court, referring to the District Court's ruling and misreading it, said that the District Court had held that representations made in the direct mailings might be subject to regulation "even if a direct ban were impermissible," when the district court had said that a ban might not be unconstitutional. The important point is that both courts were frozen into inactivity because of their belief, mistaken though it was, that this Court, in its various rulings, had held that the offensive letter probably could not be banned; and so they did not act. Certain it must be that this Court will want to make it abundantly clear that the courts can constitutionally ban such letters as the one quoted above from the District Court opinion. *Adams* is *Ohralik* in writing.

At p. 18, Shapero cites the New York cases of *Koffler* v. *Joint Bar Association*, 412 N. E. 2d 927 (1980) and *In Re Von Wiegen*, 470 N. E. 2d 838 (1984). Both are weak au-

thority. In *Koffler,* regardless of the terminology used in the opinion, the case cannot properly be said to have involved *targeted* direct mail advertising or solicitation, for the opinion shows that the letter was addressed to 7500 real property owners, who were solicited to use respondent's services in connection with the sale of real property. The letter contained the sentence "We understand that you are selling your home," a statement which the lower court found impossible to accept because the letter was addressed to so many people (412 N. E. 2d at 932). In effect, the mailing was a mass general mailing which may have been objectionable for other reasons but not because it was a *targeted* direct mail solicitation.

The case in its objectionable attributes was not unlike the mailing involved in *Eaton* v. *Supreme Court of Arkansas,* Ark., 607 S. W. 2d 55 (1980), certiorari denied 450 U. S. 966 (1981), in which Eaton and Benton received a private reprimand for having dispatched 10,000 fliers to households in the North Little Rock area which inquired in bold face capitals "NEED A LAWYER?" and stated a fee of $10 for the first consultation. In Arkansas the mass mailing was not approved; in New York, it was. In neither case was there targeted direct mail solicitation in the sense that neither mailing zeroed in on those with known legal problems.

Subsequently, the New York Court which decided *Koffler* decided *Greene* v. *Grievance Committee,* N.Y., 429 N.E. 2d 390 (1981), in which this Court denied certiorari 455 U. S. 1035. In *Greene,* in the strongest terms, the New York Court condemned the sending by Greene of some 1,000 direct mail flyers to real estate brokers, urging the recipients to recommend him for real estate closings. The difference between *Koffler* and *Greene* was that Koffler



did his own soliciting (which the court approved) while Greene in effect used a runner (of which the court disapproved), a distinction not followed by courts such as Kentucky, which would condemn either form of solicitation.

In the *Von Wiegen* case, 470 N. E. 2d 838, earlier mentioned, the New York Court, disagreeing with its lower court, found that the solicitation by mail of the victims and families of the 250 persons injured when the sky-walk collapsed at the Hyatt Regency Hotel in Kansas City was not objectionable *in theory;* but the court condemned *in the concrete* Von Wiegen's letters of solicitation because they represented that a litigation coordinating committee had been established, which was true, but the only members were Von Wiegen and his former secretary. The letters also represented that many accident victims or their families had requested representation by Von Wiegen when none in fact had requested representation by him.

At pages 18-19, Shapero cites and quotes from *In Re Amendment to S.J.C. Rule 3:07,* Mass., 495 N. E. 2d 282 (1986), but the quotation on page 19 of Shapero's brief shows that the Massachusetts court *assumed* that this Court had already decided that solicitation of employment by a lawyer for a fee by such means as the mail had already been decided by this Court to be constitutionally required, when the fact is that the issue first comes before this Court in the case at bar.

Shapero complains (brief, page 23) that since there was no finding below that his advertisement was false, misleading, deceptive or overreaching, there is no basis for imposing "absolute censorship" on what he calls "this printed advertisement" (meaning his letter of solicitation), citing *Zauderer.* But if, as the Supreme Court of Kentucky determined, the harm likely to result from Shapero's targeted

direct mail solicitation can only be controlled by prohibiting it, explicit findings are unnecessary. For it was said in *Ohralik* (436 U. S. at 468):

> . . . Under our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. . . .

The rule was otherwise in *Primus* "[w]here political expression or association is at issue" (436 U. S. at 434); but neither of those is present in the case at bar, this case involving only raw, naked solicitation by a lawyer of remunerative employment, an activity which ranks not at all in the order of priorities under the First Amendment.

Because the Supreme Court of Kentucky took as its guide *Ohralik* and found that the dangers from direct solicitation result whether the solicitation is in person or by mail, Shapero's argument (page 30) that the respondent has the burden of proof to condemn his *advertisement* misses the point that what is here involved is Shapero's *solicitation.*

At page 27 Shapero quotes a statement from *Matter of Discipline of Appert,* Minn., 315 N. W. 2d 204 (1981) at 211, that the character of the mailing, be it solicitation or advertising, should not be treated as significant. But that was said in a discussion of *Primus* where associational or political rights were involved. Neither is involved here, where a lawyer is merely seeking employment, and the distinction between advertising and solicitation is of controlling significance.

Shapero errs (page 33) when he asserts that "as recently as the period from 1977 until 1982" there was no



prohibition against targeted solicitation in the Kentucky Rules, and he cites *Stuart,* 568 S. W. 2d 933. But *Stuart* states as plainly as words can be written (page 934) "The letters contain no words generally associated with solicitation." *Stuart* involved letters of advertisement. Stuart and his colleague Thompson were accused, as Shapero says, of violating disciplinary Rule 2-103(A) by sending letters of solicitation; but the Supreme Court of Kentucky held that Stuart's letters were not letters of solicitation but letters of advertisement. The disciplinary rule, which existed, was therefore not violated. Letters of advertisement are still permissible under the newly adopted Rule 7.3.

Shapero concedes (page 34) that the possibility of undue influence, overreaching or intimidation may exist in targeted mail solicitation; and that is just what the Kentucky Supreme Court held as the basis for its adoption of Rule 7.3. Such concession by Shapero destroys his case if, as we contend and as the Kentucky Supreme Court found, the rule of *Ohralik* should be applied to targeted mail solicitation; for, as above shown, it was held in *Ohralik* (page 468) that because of the State's interest in averting harm by prohibiting solicitation in circumstances where harm is likely to occur, "the absence of explicit proof or findings of harm or injury is immaterial."

We take exception to Shapero's statement beginning at page 39 about what he found in his examination of 240 attorney disciplinary cases since the *Bates* decision in 1977. Where are the cases? Where is the study? It would be bad enough if Shapero were to wheelbarrow the study into this record in an attempt to bolster his case. It is infinitely worse for him to put forward not the alleged study but the alleged results thereof. Respondent cannot be expected to accept Shapero's statement of conclusions. The case is

not to be tried on faith in what Shapero says, especially when his brief contains so many errors as to suggest that any study he made would be similarly flawed.

Shapero's infatuation with the reports of the FTC staff continues unabated (page 40 et seq.), although he has not established in this record that the FTC or its staff has any jurisdiction over lawyer advertising or solicitation. The FTC or its staff are at best hyperactive volunteers, the accuracy of whose work has not been tested in this record. There is a limit to the *Brandeis brief* approach, and it has certainly been exceeded here.

Shapero says at page 41 that an "FTC report" found that *advertising* of legal services tends to reduce costs. If so, we applaud. But we may inquire as to the relevance of the statement in this case, which concerns, not advertising, but solicitation.

Pursuing what he considers to be his trade, Shapero argues (p. 42) that "targeted direct mail advertising is more cost efficient." But the law is not a trade, and the comparison is therefore inapt. Besides, we say again, the issue in this case is not advertising but solicitation.

At page 43 Shapero again wheelbarrows into the record the alleged information that there were only "two reported cases of attorney direct mail advertising discipline which were properly unpheld" but the cases are not identified, and the reason why discipline in the other cases were not "properly" upheld is not given. For his assertion that targeted direct mail advertising is now permitted in 22 states, Shapero cites an item from the ABA/BNA Manual, Issue No. 15, August 19, 1987, at page 270. What the Court will find at that reference its a very brief report of a *debate* at a workshop at the annual meeting of the ABA in which one debater made the assertion which Shapero



cites—and there is nothing in the report to support that assertion. The opposing debater, on the other hand, blamed the lack of evidence of abuse on "understaffed, underfinanced bar associations, which cannot focus scant resources on the targeted mail issue." In any event, the issue here is solicitation, not advertising.

At page 46, Shapero misrepresents the opinion of Justice O'Connor (written for herself, The Chief Justice and Justice Rehnquist) in *Zauderer*. Shapero states:

> In her dissent, Justice O'Connor asserted that the *Zauderer* rule would encourage lawyers to provide targeted direct mail advice. *Id.* at 678-79. In so doing, Justice O'Connor referred to the letter sent to accident victims in *In Re Von Wiegen*, 470 N. E. 2d 838.

Here is what Justice O'Connor wrote, and it is a far different thing from what Shapero has attributed to the opinion (471 U.S. ____, 85 L. Ed. at 690):

> . . . Given the exigencies of the marketplace, a rule permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring potential clients into the office, rather than that advice which it is most in the interest of potential clients to hear. In a recent case in New York, for example, an attorney wrote unsolicited letters to victims of a massive disaster advising them that, in his professional opinion, the liability of the potential defendants is clear. Matter of Von Wiegen, 101 App. Div. 2d 627, 474 NYS 2d 147, modified, 63 NY 2d 163, 470 NE 2d 838 (1984), cert. pending, No. 84-1120. Of course, under the Court's opinion claims like this might be reached by branding the advice misleading or by promulgating a state rule requiring extensive disclosure of all relevant liability rules whenever such a claim is advanced. But even if such a claim

> were completely accurate—even if liabililty were in fact clear and the attorney actually thought it to be so—I believe the State could reasonably decide that a professional should not accept employment resulting from such unsolicited advice. See *Ohralik*, 436 U. S., at 461, 56 L. Ed. 2d 444, 98 S. Ct. 1912. . . .

Justice O'Conner made no assertion that the *Zauderer* rule would encourage lawyers to provide targeted direct mail advice, as Shapero says. She said that a rule permitting the use of legal advice in advertisements will encourage lawyers to present [illegible]dvice most likely to bring potential clients into th[illegible]e"; and she cited *Von Wiegen*, where, to get potential clients into the office, Von Wiegen spoke less than the truth about a "litigation coordinating committee" consisting of Von Wiegen and his former secretary and falsely represented that many accident victims or their families had requested representation by him when none in fact had requested representation by him. So, Justice O'Connor's opinion hurts Shapero's case.

The Kentucky Supreme Court did not ignore "the explicit holdings of *Zauderer* and *R.M.J.*" as Shapero says at page 46. The Kentucky Court heeded *Zauderer* in eliminating its overly broad rule SCR 3.135 (5)(b)(i), just as Shapero requested; and neither *Zauderer* nor *R.M.J.* had any "explicit holdings" regarding targeted direct mail solicitation, the issue in the case at bar.

## CONCLUSION

To summarize:

First, the writ of certiorari should be dismissed for want of jurisdiction, or the judgment should be affirmed, for the reason that Shapero did not present to the Supreme Court of Kentucky for its consideration the objections he here advances, for the first time, to the adoption of Model Rule 7.3.



Secondly, even if targeted direct mail solicitation for pecuniary gain is a constitutional right, Shapero's proposed soliciting letter is fatally flawed and not such a letter as the Supreme Court of Kentucky can be required to approve. It therefore neither presents not supports a constitutional issue, and the judgment should be affirmed since overbreadth analysis is inapplicable to commercial speech.

Third, if the merits are reached, the Court should affirm the determination of the Kentucky Court that direct solicitation creates dangers of harm whether the solicitation is in person or by mail and that the State may act to avert that harm by prohibiting such solicitation, as held in *Ohralik* (436 U. S. 468). On this third point, the Court must choose whether the rule of *Zauderer* or the rule of *Ohralik* appropriately fits this case. It it chooses *Zauderer*, this Court will forbid the highest court of every state to outlaw targeted direct mail solicitation by lawyers of professional employment for pecuniary gain. The Court will cast the net of national uniformity upon the entire Nation, so that whether a problem arises in Portland, Maine or Portland, Oregon, Lahaina, Hawaii, or Louisville, Kentucky the State's highest court will be forbidden to prohibit this form of solicitation by lawyers regardless of the circumstances of the problem and the history and tradition of the particular State. On the other hand, if this Court chooses *Ohralik*, it will forbid nothing. It will come down on the side of freedom for the fifty sovereign and responsible States. It will leave it to the highest court of each State to decide whether mail solicitation by lawyers for pecuniary gain is to be allowed or prohibited. If New York finds it to be in the public interest to allow such

solicitation, it will be free to do so. If Kentucky, or Kansas, or Louisiana, or Indiana, or Florida or any of the other States finds it to be not in the public interest, it will be free to prohibit it. Choosing the *Ohralik* rule will enable the Court to give effect to the concept of comity which Justice Black, for the Court, so eloquently expressed in *Younger* v. *Harris*, 401 U. S. at 44:

> . . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Respectfully submitted,

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# REPLY

# BRIEF

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No. 87-16

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD D. SHAPERO - - - - Petitioner

*versus*

KENTUCKY BAR ASSOCIATION - - Respondent

On Certiorari to the Supreme Court of Kentucky

## PETITIONER'S REPLY BRIEF

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No. 87-16

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

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RICHARD D. SHAPERO - - - - *Petitioner*

*v.*

KENTUCKY BAR ASSOCIATION - - *Respondent*

---

ON CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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## PETITIONER'S RESPONSE TO THE MOTIONS OF

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## INTRODUCTION

The Kentucky Bar Association ("KBA") and the amici curiae treat this case as if it were this Court's first lawyer advertising case. But this is not a case to be decided on a clean slate and the arguments of the amici and the KBA do not in any meaningful fashion address the issues deemed relevant by this Court in its previous lawyer advertising decisions, particularly *Zauderer* v. *Office of Disciplinary Counsel,* 471 U. S. 626 (1985):

- None of the lawyer associations bothers to address the holding of this Court in *Zauderer* that "an attorney may not be disciplined for *soliciting legal business through printed advertising containing truthful and nondeceptive information and advice* regarding the legal rights of potential clients." (Emphasis supplied.) 471 U. S. at 647.

- The lawyer associations have failed to shoulder the burden this Court has imposed upon them to justify limitations on the exercise of First Amendment rights. 471 U. S. at 641.

- Instead, contrary to this Court's holding in ***Zauderer,*** the lawyer associations have continued to attempt to justify a blanket ban on commercial speech through "unsupported assertions." In so doing the lawyer associations have failed to "cite any evidence or authority . . . for [their] contention[s] that potential abuses . . . cannot be combated by any means short of a blanket ban." 471 U. S. at 648.

- The lawyer associations have failed to distinguish analytically between targeted direct mail advertising (Shapero), nontargeted direct mail advertising (*In re R.M.J.*, 455 U. S. 191 (1982)), targeted advertising (*Zauderer*) and in-person solicitation (*Ohralik* v. *Ohio State Bar Association,* 436 U. S. 447 (1978)).

## ARGUMENTS

### I. This Court Has Jurisdiction to Consider the Question Presented Inasmuch as it Was Presented to and Decided by the Highest Court of Kentucky.

The KBA contends that this Court lacks jurisdiction because the Kentucky Supreme Court "should have had the opportunity to hear, consider and act upon [Shapero's] objections." KBA Brief at 13. Shapero's sole argument before the Supreme Court of Kentucky, however, concerned the constitutionality of prohibitions against direct mail solicitation and his right to publish a very specific letter. The Supreme Court of Kentucky, after ample discourse on the subject, ruled that prohibitions against targeted direct mail advertising do not offend the First Amendment to the Federal Constitution and, accordingly, the letter in



question could not be sent. *See Shapero* v. *Kentucky Bar Association,* 726 S. W. 2d 299 (Ky. 1987).

While the Kentucky Supreme Court did invalidate the old Kentucky advertising rule (SCR 3.135(5)(b)(i)), it did so for reasons having nothing to do with any of the issues raised by Shapero. Rather, the Kentucky Supreme Court apparently discovered that the holding in *In re Primus,* 436 U. S. 412 (1978), rendered the Kentucky rule unconstitutional because the rule prohibited legal solicitation for both *pecuniary* and *non-pecuniary* reasons. Accordingly, the Kentucky high court deleted the old rule. The Kentucky Supreme Court, however, then went on to reject *all* of Shapero's arguments that targeted direct mail solicitation was appropriate and adopted a new rule which, like the old rule, also prohibited Shapero's targeted direct mail advertisement.

None of the reasons set forth in *Cardinale* v. *Louisiana,* 394 U. S. 437, 438-39 (1969), for this Court's refusal to decide federal constitutional issues raised for the first time on appeal is present in this case. First, the issue of the federal constitutional validity of direct-mail solicitation of pecuniary business was directly and explicitly addressed by all parties in the state forum and was the basis of the Kentucky court's decision.[1]

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[1] As the Kentucky Supreme Court, itself, wrote:

> The crux of the matter is whether the state has a substantial governmental interest that is directly served by prohibiting solicitation by direct targeted mailing sent to potential clients known to have a specific legal problem and whether the targeted direct mail may be prohibited because it is improper

*(Footnote Continued on Next Page)*

Second, if the record is inadequate, it is because the state court chose to decide the issue on purely legal rather than factual grounds and is not due to any failure to raise the question below. Third, the Kentucky court was given the first opportunity to consider its rule in light of the constitutional challenge and met that challenge head-on. Finally, the Kentucky court's decision was based squarely on the federal constitutional issue and not on any independent state ground.

The only credible explanation for the KBA's raising this issue could be a mistaken belief that a lower court's adoption of a literally different but essentially identical (if not more stringent) rule governing the question somehow divests this Court of jurisdiction. But this Court has long recognized that a litigant's right to Supreme Court review may not be victimized by such circumstances. See, e.g., *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 413-14 (1935), in which this Court rejected the argument that the amendment of regulations in issue after the filing of the suits in question deprived it of jurisdiction. To like effect, see *Francisco* v. *Gathright,* 419 U. S. 59 (1974), in which this Court rejected a similar contention, holding that the state court "had a full opportunity to determine the federal constitutional issues before resort was made to a federal forum, and the policies served by the exhaustion requirement would not be furthered by re-

*(Footnote Continued From Preceding Page)*

solicitation and the rule is in proportion to the governmental interest served.

*Shapero,* 726 S. W. 2d at 300.



quiring resubmission of the claims to the state courts." *Id.* at 63. "Still more state litigation," this Court had noted in a similar case "would be both unnecessarily time-consuming and otherwise burdensome." *Roberts* v. *LaVallee,* 389 U. S. 40, 43 (1967).

The same considerations apply here. The Kentucky Supreme Court has already ruled that targeted direct-mail solicitation by lawyers may constitutionally be prohibited and that Shapero's proposed letter may be banned. There is no point in imposing upon Shapero the artificial and meaningless requirement that he ask the state court to reconsider a decision it has already made.

The KBA's abstention arguments citing *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Middlesex Ethics Committee* v. *Garden State Bar Association,* 457 U. S. 423 (1982), are completely misplaced. While these cases "espouse a strong federal policy against federal-court interference," this policy applies only to "*pending* state judicial proceedings." *Id.* at 431 (emphasis added). Once the Kentucky Supreme Court rendered its final decision, all state proceedings were concluded. There simply are no *pending* state judicial proceedings to bar this Court's consideration of the question under review.

## II. Shapero's Proposed Advertisement May Not be Censored Because There Has Been No Explicit or Implicit Finding That it is False, Misleading or Deceptive.

In its second argument the KBA assumes, for argument's sake, that Model Rule 7.3 unconstitutionally prohibits targeted direct mail advertising. Given this

assumption, the KBA reasons that Shapero is still not entitled to relief because his proposed advertisement can be prohibited on other grounds, i.e., that it is "likely to result in the evils of being misleading, overbearing, or of involving other features of deception or improper influence." KBA Brief at 21.

The KBA surely cannot be blind to the fact that neither its own two committees which reviewed Shapero's letter nor the Kentucky Supreme Court made any finding that Shapero's letter actually suffered from these alleged faults.[2] Nor does the KBA deny that the record must reflect such a finding in order to support an advertising ban on these grounds. *In re R.M.J.*, 455 U. S. at 206.

Instead, the KBA "reasons" that the Kentucky Supreme Court actually found that Shapero's letter was "likely to result in the evils of being misleading, overbearing, or of involving other features of deception or improper influence." KBA Brief at 21. The KBA's

[2]In its brief, the KBA launches a broadside attack against Shapero's letter, characterizing it as "high pressure" "overbearing" solicitation intended to overwhelm a gullible recipient. KBA Brief at 20. The most obvious problem with these assertions is that they were never advanced by either the Kentucky Supreme Court, the Kentucky Advertising Commission, the Kentucky Ethics Committee, *or* the KBA until this point in the case. In fact, in its brief in the Kentucky Supreme Court, the KBA admitted that while "some lawyers would use [the type of solicitation it opposed if the Kentucky prohibition were removed], this is not . . . to suggest that Shapero contemplates this type of letter." KBA Brief to the Kentucky Supreme Court at 6. Even if these arguments *had* been properly raised in the Kentucky Supreme Court, there would be no basis to sustain them because they amount at most to mere unsupported assertions lacking foundational evidence or authority.



first premise for this conclusion is that the Kentucky Supreme Court "found that it could prohibit direct targeted solicitation 'under circumstances likely to' " "be misleading, overbearing, or involv[ing] either features of deception, or improper influence." KBA Brief at 21. This is not true. The Kentucky court cited *Ohralik*, for the rule that "[a] state may forbid *in-person* solicitation for pecuniary gain under circumstances *likely* to result in those evils." *Shapero*, 726 S. W. 2d at 301; App. to Petition for Cert. at 6a (emphasis added). But, the Kentucky court did not find that targeted direct mail advertising was *likely* to result "in those evils." It actually found that it could prohibit targeted direct mail advertising because it "is full of the *possibility* of undue influence, overreaching and intimidation." *Id.*; App. to Petition for Cert. at 7a (emphasis added).

"Likely" means that an occurrence is "probable," and "possibility" means only "an uncertain thing which may happen." *See Black's Law Dictionary*, 834, 1049 (5th ed. 1979). Thus, the KBA has transformed the Kentucky Supreme Court's actual finding that certain evils are a "possibility," which falls far short of the *Ohralik* standard that the evils must be "likely," into the very standard used in *Ohralik* to measure the degree of probability to which an occurrence must rise to merit a prohibition of speech. This misstatement of the Kentucky Supreme Court's actual finding nullifies the KBA's conclusion that, since the state court did not approve Shapero's letter, it implicitly found the letter "was *likely* to result in the evils of being misleading,

overbearing, or of involving other features of deception or improper influence." KBA Brief at 21 (emphasis added).

Finally, the KBA implies that the *only* reason the Kentucky court could have had for not approving Shapero's letter was that it was "likely" to be misleading, etc., and, therefore, that court must have found that the letter was subject to those faults. The premise of this argument, however, is clearly wrong. As pointed out above, the Kentucky court did not find that all targeted direct mail advertising is *likely* to be misleading, overreaching or deceptive. Consequently, some targeted direct mail advertising may not be misleading, overreaching, or deceptive, but, according to the state court, may be banned anyway simply because it *is* targeted direct mail advertising.

This is precisely why Shapero's letter was not approved—because it was targeted direct mail advertising and not because the letter, itself, was misleading, overreaching or deceptive or was likely to result in those evils. No amount of tortuous reasoning can change the fact that the Kentucky court made *no* qualitative finding regarding Shapero's letter. The KBA has not met its burden of establishing that the letter may be censored.

### III. The KBA's Distinctions Between Tradesmen and Professionals and Between Solicitation and Advertising Are Irrelevant.

The KBA's third argument dwells at length on the irrelevant observations that Shapero seeks to reduce the practice of law from a profession to a trade and



that Shapero does not recognize the distinction between advertising and solicitation. KBA Brief at 29-30.

But in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 371-72 (1977), this Court stated that

> In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.

In like manner, there is no constitutionally sound distinction between lawyers and other professionals, such as bankers, engineers, doctors, optometrists, certified public accountants, stock brokers and dentists, all of whom are permitted to engage fully in non-deceptive advertising. As this Court pointed out in *Bates*, "[b]ankers and engineers advertise, and yet these professions are not regarded as undignified." 433 U. S. at 369-70.

The KBA's belabored attempts to distinguish between "advertising" and "solicitation" also conveniently ignore this Court's previous holdings:

> [A] State cannot foreclose the exercise of constitutional rights by mere labels. . . . Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

*Bigelow* v. *Virginia*, 421 U. S. 809, 826 (1975). If there were any doubts that the distinction between

"solicitation" and "advertising" for First Amendment purposes is irrelevant, they were laid to rest by this Court in *Zauderer* when it held that "[a]n attorney may not be disciplined for *soliciting* legal business through printed *advertising* containing truthful and nondeceptive information and advice regarding the legal rights of potential clients." 471 U. S. at 647 (emphasis supplied).

Not even the ABA would go this far. In a publication produced by the ABA on lawyer advertising the author rejects supposed distinctions between "advertising" and "solicitation" as being "black magic":

> Historically, lawyers have chosen not to view direct mail and in-person contact as forms of advertising. Moreover, these two very different means of communication (mail and social contact) have been lumped together under the term of 'solicitation' without sufficient analysis of the different types of benefits and problems they present. Indeed, the term 'solicitation' itself has taken on a mystical connotation. In a rather artful bit of black magic, the legal profession has convinced itself that any action labeled 'solicitation' should be forbidden. Take that same action and call it 'advertising,' 'political speech,' or 'an expression of freedom of association,' and it mystically becomes permissible.

L. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation* 61 (1980).

**IV. The Reasons Advanced in Support of Model Rule 7.3 Are Constitutionally and Logically Insufficient.**

The KBA argues that general advertising informs potential clients about the need for legal services "without subjecting them to direct personal pressure [or] intimidation." KBA Brief at 29. This supposed distinction, however, applies with equal force to all direct mail, including both Shapero's targeted mailings and the non-targeted mailings approved by this Court in *In re R.M.J.* Similarly, in its Amicus Brief, the American Trial Lawyers Association ("ATLA") argues that because targeted direct mail advertisements suggest that the recipient call a lawyer, the dangers of in-person solicitation addressed in *Ohralik* would ensue. ATLA Brief at 18. This danger, however, exists with respect to *any* advertisement. The ATLA argument does not differentiate between targeted direct mail advertising and other types of advertising previously approved by this Court.

ATLA also argues that "it is certainly not unreasonable for a state to determine that its citizens would view the arrival of an attorney's letter, speaking directly to the individual's legal problem, as similarly intrusive." ATLA Brief at 19. This determination certainly *would* be unreasonable since this Court has already decided that untargeted mailings from attorneys are constitutionally protected. The fact that by happenstance a mass mailing may address a legal problem of a particular recipient cannot reasonably be grounds for banning that advertisement.

Ignoring the reality of the Kentucky situation, the KBA and the ABA argue that a pre-review procedure would not be effective because bar associations are too overworked to review submitted advertisements. Once again, however, there is no evidence to support this

assertion. In fact, Kentucky's situation has proven to be just the opposite. The Kentucky Advertising Commission and its pre-review procedures are alive and well. If policing or overwork problems did exist, the KBA's own Advertising Commission would certainly have raised them. Instead the Kentucky Advertising Commission recommended that the Kentucky rule prohibiting targeted direct mail advertisements be deleted as unconstitutional. App. to Petition for Cert. at 15a.

The lawyer associations repeat the by-now hackneyed statements that there is no difference between personal contact by lawyers and direct mail solicitation because both result in "overreaching, intimidation or misleading . . . solicitation." Once again, there is no support for this broad statement of fact and practical experience counsels otherwise.[3] The conditions that led to the discipline approved in *Okralik* simply are not present when solicitation arrives as advertisement through the mail, thereby posing "much less risk of overreaching or undue influence." *Zauderer*, 471 U. S. at 642. *See* Shapero's Brief at 26-30.

The lawyer associations argue that targeted direct mail advertisements may be banned because of the potential impact of the advertisements on certain sen-

[3]According to the Florida Bar Association ("FBA"), "virtually no one" who received a targeted direct mail solicitation in the Florida survey believed "that the direct mail advertisement they received from an attorney was either intimidating or frightening or confusing." *See infra*, p. 17, and Appendix at 4a.



sitive individuals.[4] Such individuals apparently are unable to function following a tragedy and are particularly vulnerable to being duped by attorneys. These individuals cannot distinguish between advertisements which arrive in the mail—even advertisements which identify themselves as an "advertisement" as required under Kentucky law—and other mail. It is unclear whether these individuals would be sufficiently competent, for example, to defend themselves in a foreclosure proceeding, choose a doctor to operate on an injured victim, hire a lawyer to probate the estate of a deceased victim or choose a funeral director. We seriously doubt that outside of state institutions few, if any, such individuals exist. But if they do exist to the extent sufficient to justify blanket bans on speech, it is incumbent upon the lawyer associations and the state courts to prove their existence. This Court should not act on such a thin or nonexistent reed to foreclose important First Amendment rights.

In their briefs, the lawyer associations simply ignore the salutary aspects of targeted direct mail

[4]For example, the KBA disingenuously raises the specter of "a telegram received by the family two hours after the death of a train-truck accident victim." KBA Brief at 28. There is no doubt but that under the Kentucky rules such a situation could never occur. As pointed out before, Kentucky attorneys are required to provide 30 days' advance notice of any advertisements they propose to use, along with a list of all people to whom the advertisements are to be sent. In addition, the Kentucky Advertising Commission is fully empowered to investigate all the facts and circumstances surrounding the mailing and if the Advertising Commission determines that the mailing is false, misleading, deceptive or overreaching, appropriate legal action can be taken. Shapero's Brief at 37-38.

solicitation. They suggest, with mock concern for the public good, that the only evidence to be weighed in this constitutional equation is evidence of the ills that result from this type of attorney advertising and that under most circumstances ignorance respecting legal problems is bliss. But lawyers who are involved in plaintiffs' litigation are well aware that perhaps the most important thing that can be done in a plaintiff's case is to preserve the evidence and quickly. If weeks, months, or years are allowed to elapse after an accident, it is likely that important evidence may disappear, memories may grow foggy and statutes of limitations may run. Under these circumstances, the first contact following an accident is more likely to be from the defendant's insurance adjuster rather than a lawyer who has the victim's interests at heart.

**V. Blanket Prohibition of Targeted Direct Mail Advertising Is Not a Reasonable Time, Place or Manner Restriction.**

In its amicus brief, the FBA argues that the Kentucky Supreme Court's blanket prohibition of all targeted, direct mail advertising is constitutional because it is a *reasonable* time, place or manner restriction.[5] This argument too must fail.

*First,* the FBA asserts that Shapero's arguments based upon the analytical framework adopted in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York,* 447 U. S. 557, 561-66 (1980),

[5]This argument, which was not considered below and was not advanced by the Respondent KBA, is not properly before this Court. *See Knetsch* v. *United States,* 364 U. S. 361, 370 (1960); *United Parcel Service* v. *Mitchell,* 451 U. S. 56, 60 n.2 (1981); and *Bell* v. *Wolfish,* 441 U. S. 520, 531 n.13 (1979).



must fail because, in reality, Rule 7.3 is a reasonable time, place or manner regulation. See Petitioner's Brief at 12-13. However, the *Central Hudson* analysis and the time, place and manner analysis were lumped together by this Court as being "substantially similar" in *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee,* 483 U. S. —, 97 L. Ed. 2d 427, 448-49 n.16 (1987). A rule which runs afoul of the *Central Hudson test,* therefore, also would not meet the reasonable time, place or manner test.

*Second,* even a cursory look at Model Rule 7.3 in light of this Court's attorney advertising precedents shows that the regulation is not based on the time, place or manner in which the information is presented. Instead, the rule is based on the content of the speech prohibited and must be carefully scrutinized. *Consolidated Edison* v. *Public Service Commission,* 447 U. S. 530, 536 (1980). In *In re R.M.J.,* 455 U. S. at 204-206, this Court rejected as unconstitutional a regulation forbidding an attorney from mailing announcement cards "to persons other than 'lawyers, clients, former clients, personal friends, and relatives.' " The only difference between the advertisements approved in *In re R.M.J.* and the targeted direct mail advertisements prohibited by the Kentucky Supreme Court is their content: the *In re R.M.J.* advertisements were general, and Shapero's advertisement concerns the recipient's particular legal problem.

*Third,* the restrictions of Model Rule 7.3 are not *reasonable* because there are less restrictive means to

accomplish the same ends. As pointed out previously, there has been no showing that the Kentucky Advertising Commission's pre-review process coupled with the "this is an advertisement" disclosure requirements of SCR 3.135(5)(b)(ii) will not provide sufficient protection to targeted mail recipients.

**VI. The "Surveys" Submitted by the Florida Bar Association and Florida Trial Lawyers Association Do Not Meet Accepted Scientific Standards and Since Shapero Has Had No Rebuttal Opportunity Should Not Be Considered by This Court.**

The FBA and Academy of Florida Trial Lawyers ("AFT") have submitted "surveys" and "studies" which they commissioned to show that consumers do not like targeted direct mailings. However, since this information was not considered below and was not advanced by the Respondent it may not be presented for the first time by the amici. *See supra,* p. 14.[6] Moreover, since Shapero has had no opportunity to cross-examine this information or to present countervailing information, it would be unfair to consider these surveys as evidence in this case.

In addition, upon initial review, the FBA survey report appeared to be incomplete. After requesting additional information, Shapero discovered that, indeed, crucial information supporting *his* position had been deleted from the survey report submitted to this Court. Accordingly, Petitioner has submitted in the Appendix to this Brief the omitted information, which

[6]In fact, the FBA's survey was not made until *after* certiorari was granted in this case. FBA Brief at A4.



contains *the only finding* which has even remote relevance to this case. According to the FBA's survey report:

> [V]irtually no one believes that the direct mail advertising they received from an attorney was either intimidating or frightening or confusing.

Appendix at 4a. This conclusion should end the inquiry, if it is a valid inquiry at all. The only concern about direct mail advertising raised by any of the parties, including the Kentucky Supreme Court, is its impact on recipients. Since "virtually no" recipient believed that targeted direct mail advertising has the posited adverse impact, how can the Kentucky rule stand?

Moreover, we seriously doubt that the "surveys" and other opinions submitted by the FBA and the AFT are entitled to any weight in this case since a determination of basic constitutional rights could hardly be dependent upon whether a certain percentage of a sampled population agrees that those rights exist.[7] Nonetheless, there are additional important legal reasons why the "surveys" and "studies" should not be considered by this Court.

This Court has taken care in the past, in evaluating the use of "studies" in civil rights cases, to ensure that proper scientific methodology has been employed. *See, e.g., Lockhart* v. *McCree,* 476 U. S. 162, 106 S. Ct. 1758,

[7]If in fact direct mail is offensive to most people, market forces will surely resolve the problem; if targeted mailings don't sell, they won't be used.

1761-64 (1986), and *Batemore* v. *Friday*, 478 U. S. ——, 92 L. Ed. 2d 315, 331 (1986).[8]

It is virtually impossible, however, to evaluate the surveys submitted by the AFT and the FBA since the summaries of the survey which were presented do not contain a methodology section, any tables or the full survey results. Even the partial survey results, however, clearly demonstrate that the surveys have not been shown to have been conducted in accordance with accepted survey standards.

1. The first requirement of any survey is that it must be representative of some relevant population. P. Stern, *Evaluating Social Science Research* 77-78 (1979); H. Cantril, *Gauging Public Opinion* 129 (1944). There is no claim made anywhere in the survey documents that the surveys are, in fact, representative.[9]

2. The surveys failed to specify the statistical significance of the data reported. Without this crucial information it is simply impossible to know whether the surveys measured anything at all and, if they did,

[8]*See also*, R. Hite and J. Bellizzi, *Consumers' Attitudes Toward Accountants, Lawyers and Physicians with Respect to Advertising Professional Services*, J. Advertising Research 45 (June/July 1986), for an *independent* study which employs more accepted methods of reporting survey results.

[9]For example, the AFT survey attributes significance to the experience of "[m]ore than one Florida personal injury lawyer." AFT Brief at A3. We suspect that if one were to look hard enough one could find "more than one lawyer" who has had a wide variety of unbelievable experiences. But this questionable methodology is hardly the way to evaluate an important constitutional issue.



how accurate they were. Cantril, *supra*, at 130; C. Selltiz, M. Jahoda, M. Deutsch, and S. Cook, *Research Methods in Social Relations*, 448-49 (1959).

3. The surveys bear the same logical defects contained in the briefs of the other lawyer associations. While the FBA and the AFT decry lawyer advertising in its various forms, few steps are taken in the survey instruments to distinguish between lawyer advertising in general, in-person solicitation, and targeted direct mail advertising. Virtually none of the questions contained in the FBA survey is designed to address targeted direct mail advertising specifically, as opposed to direct mail solicitation not conducted on a targeted basis. No attempt is made to assess the difference between receiving a letter as part of a random mailing and receiving a letter where the recipients are targeted.[10] The reason this distinction cannot be drawn is obvious. *From the recipients' standpoint it is impossible to distinguish between these two types of mailing;* the impact on the recipients is exactly the same.

4. Other attitudes reflected in the FBA survey overreach in the other direction. For example, in the key question relied upon most heavily by the FBA, issues are raised concerning "contact" by an attorney. But no attempt is made to distinguish between "contact" by an attorney who appears at the front door and "contact" by an attorney through a dignified non-

[10]Petitioner has not included copies of the FBA's two questionnaires. His observations regarding the wording of the questionnaires can be substantiated, however, should the Court wish Petitioner or the FBA to file copies of them.

targeted letter. All are lumped together. But the difference is quite important.

## CONCLUSION

The lawyer associations have resorted to unsupported arguments and hypotheses to support their blanket rule against targeted direct mail solicitation. The record is totally devoid of evidence of any dangers which are likely to flow from the use of targeted direct mailings. Even in their factually unsupported arguments, the lawyer associations are unable to draw an arguable distinction between general mailings of the type approved in *In re R.M.J.*, which by happenstance end up in the home of a person having a specific legal problem, and Shapero's targeted mailings, which are purposely sent to the homes of people having specific legal problems. Lacking in either rational, logical, factual or legal support, it is clear that the Kentucky rule must be overturned.

Respectfully submitted,

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# APPENDIX

*Detailed Findings*

The following are the primary specific findings of this research project.

1. A majority of Florida adults (58% of the general population and 73% of the direct mail recipients) have retained an attorney at one time or another. The vast majority of those who have retained an attorney (66% of the general public and 59% of direct mail recipients) have done so to handle routine legal matters such as wills and real estate transactions. However, at least a fifth in each survey have also retained a lawyer to represent them in a family or marital action, a lawsuit, or an accident or injury claim.

2. Those persons who have retained an attorney during the past have almost invariably relied on personal knowledge—their own or someone else's—to find that attorney. A majority (54% of the general public and 59% of direct mail recipients) retained their attorney on the basis of a recommendation from a family member, friend, or colleague. Around a third in both surveys hired an attorney who was a personal acquaintance. No more than one in 20 of those who had ever retained an attorney used another method such as the telephone directory, TV advertising, direct mail advertising, or a referral from the local bar association to find their lawyer.

3. Florida adults in both surveys seem to be highly positive about the process used most frequently by the public to find and retain a lawyer. For example, in each survey, around nine in ten of those persons who had retained an attorney (90% of the general public and 86% of direct mail recipients) claim that it was "not at all difficult" to find an attorney when one was

needed. Only one in 20 claim that it was very difficult. Moreover, the vast majority (77% of the general public and 67% of direct mail recipients) claim that they had enough information available to choose the best lawyer for their needs. Incidentally, those persons who say they could have used more information in selecting an attorney most often want to find out about the attorney's background and previous experience, especially whether an attorney is a specialist in the area of the law involving their case.

4. Not only are those Floridians who have retained an attorney apparently quite satisfied with the process by which this lawyer was retained, but most were also quite satisfied with the service rendered by the lawyer. Around seven in ten persons in each survey report complete satisfaction with the service provided by their attorney (73% of the general population and 70% of the direct mail recipients). The few who are less than satisfied most frequently complain that their attorney did not work with enough diligence in handling their legal affairs.

5. Those Floridians who have never yet retained an attorney tend to hold views similar on the process of retaining one. For example, the vast majority of those who have not yet retained a lawyer's services would rely on a recommendation from another person to find an attorney (62% in the general population and 67% among direct mail recipients). About a quarter each would utilize the services of an attorney who is a personal acquaintance. Most of the rest would rely on the telephone directory or a recommendation from the local bar association to find a lawyer should they need one. Virtually no one would use an advertisement either on television or by direct mail.



6. Florida adults who have not yet utilized an attorney's services overwhelmingly believe that it will not be difficult to find a lawyer should they need one (86% of the general population and 89% of direct mail recipients). The vast majority also believe that they could easily get enough information to help them choose their attorney wisely (72% of the general population and 80% of direct mail recipients).

7. The research project also probed in depth the perceptions and attitudes toward direct mail advertising and solicitation from attorneys. Around 9 percent of the Florida adult population claims to have received a direct mail advertisement or solicitation from an attorney at some point in the past. Generally, those persons who have received such direct mail communications from a lawyer tend to hold negative perceptions of them. Perhaps, in part, these negative perceptions result from a clear recognition that the direct mail communication from a lawyer was indeed an advertisement. The vast majority of those receiving direct mail ads or solicitations from an attorney clearly were certain that these communications were advertising (75% of direct mail recipients). Perhaps because most persons had already retained an attorney or felt it would be easy to do so, few paid a great deal of attention to the ads or solicitations they received in the mail. In the direct mail recipients survey, around three in ten (30%) claim they read the ad carefully. Most (47%) simply glanced at it to see what is contained. Almost a quarter (23%) simply threw the ad away without looking at it.

8. Most of those who have received a direct mail ad or solicitation from a lawyer describe it in negative terms. Direct mail recipients were read a list of words or

phrases, both positive and negative, and asked to indicate the degree to which each describes the direct mail advertising they had received from a lawyer or law firm. Direct mail recipients are especially likely to believe that the negative descriptors best describe the mail advertising they have received from an attorney. For example, 45 percent believe that the phrase "designed to take advantage of gullible or unstable people" describes the direct mail solicitation very well. An additional 16 percent feel that this phrase describes the direct mail advertising somewhat well. Beyond this, the phases which immediately follow on the list are all negative. These include "annoying or irritating" (34% very well), "an invasion of your privacy" (26% very well), and "made you angry" (24%). By contrast, only a fifth or fewer of the direct mail recipients believe that phrases such as "truthful and honest," "informative," and "helpful" describe direct mail advertising by attorneys very well. However, virtually no one believes that the direct mail advertising they received from an attorney was either "intimidating or frightening" or "confusing."

9. Not only do Florida adults tend to have negative perceptions about the direct mail advertisements or solicitations from lawyers they may have received, but they also have less than favorable feelings about those lawyers who utilize this means to contact potential clients. The Florida public perceives lawyers who use direct mail advertising to be less experienced, honest, and concerned with the welfare of their clients than other lawyers. In both studies, at least a plurality, and often a majority, believe that lawyers who utilize direct mail advertising or solicitation are more likely to be inexperienced than experienced, a little shady



than honest and above board, and concerned with their own welfare rather than the welfare of the client. It is of particular concern that those who have, in fact, personally received direct mail advertising from an attorney are more likely than others to hold negative perceptions of the lawyers who sent out such advertising.

In their answers to this item, many respondents reveal perceptions of those attorneys who advertise by direct mail that seem to be positive on the surface. Half of more of the participants in both surveys agree that attorneys who advertise by mail are likely to be more confident rather than less confident and more aggressive on behalf of their clients rather than less aggressive. However, given the concern of many Floridians that direct mail advertising by lawyers may contribute to unwarranted, frivolous lawsuits, the perception that lawyers who advertise are self-confident and aggressive may be less positive than it appears on the surface.

On one item on this list, attitudes are about evenly divided. Florida adults do not hold clear perceptions as to whether attorneys who advertise and solicit by direct mail are more competent or less competent than others. In both surveys, about equal numbers of persons claim that such attorneys are incompetent or competent.

10. The negative perceptions of those attorneys who advertise or solicit by direct mail extend to an additional question in this research. In both the general population and the direct mail recipients surveys, a majority of respondents say that attorneys who advertise by mail are "different" from most other lawyers (51% in general population study and 61% in the direct mail recipients study).

11. The research also presents evidence that direct mail advertising may result in less positive attitudes toward the legal profession and the judicial process. For example, in the direct mail recipients survey, respondents were asked to indicate if they thought there would be any chance that the fact they had received an advertisement or solicitation by mail from a lawyer would influence the way they felt about lawyers or the trial should they be asked to serve on a jury in a civil case. It is true that a large majority (83%) say they would be impartial jurors in spite of receiving direct mail advertising from a lawyer. Still, one in ten (11%) admit that receiving direct mail advertising from an attorney could influence the way they feel about lawyers or the trial at hand. In particular, such persons would be concerned about the competence and honesty of the attorneys and the legitimacy of the case.

The research contains another even more direct indication that receiving direct mail advertising from a lawyer may influence the opinions toward the legal profession and the judicial process. Among direct mail recipients, more than a quarter (27%) claim that their regard for the legal profession and the judicial process is "lower" as a result of receiving a direct mail ad or solicitation from an attorney. Virtually no one (3%) is more favorable toward lawyers and the judicial process. It is true that the vast majority of direct mail recipients (66%) claim that their opinion of the legal profession and the judicial process has not changed since receiving direct mail advertising from an attorney. Nevertheless, the fact that more than one in four direct mail recipients are less positive could clearly have ramifications for the justice system.



12. Finally, respondents were read several statements, both positive and negative, about direct mail advertising and solicitation by lawyers. They were asked to indicate the extent to which they agreed with each statement. Generally, respondents express greatest agreement with negative statements about direct mail advertising by lawyers. A majority in both surveys (60% in the general public survey and 71% in the direct mail recipients survey) agree a lot that it is difficult to judge a lawyer's competence from direct mail advertising. A majority in both surveys also agree that it is a violation of privacy when people are contacted by lawyers they don't know concerning accidents and similar events in which they or their family has been involved (54% in the general population survey and 56% in the direct mail recipients survey). Beyond this, at least a plurality in both surveys also agree a lot that direct mail advertising by lawyers promotes unwarranted and frivolous lawsuits, takes advantage of emotionally upset people, and raises legal costs.

By contrast, a majority in both surveys reject arguments that direct mail advertising or solicitation by attorneys has a widely beneficial impact. No more than a third of the respondents in each survey strongly agree that direct mail advertising by lawyers helps advise people of their legal rights, helps people find an attorney who otherwise might not be able to find one, and holds down legal costs by promoting more competition.

It is true that most respondents do express agreement with several statements supporting direct mail advertising or solicitation by attorneys. A large majority (65% in the general population study and 57% in the

direct mail recipients study) do agree a lot that lawyers, like other businesspersons, do have a right to advertise. Equally large majorities (57% in the general population study and 58% in the direct mail recipients study) also agree a lot that direct mail advertising helps new, little-known lawyers by putting them in touch with potential clients. Yet, it should be noted that in their positive responses to these items, Florida adults seem to perceive that the benefits of direct mail legal advertising are aimed primarily at individual lawyers rather than at clients, the legal profession in general, or the judicial process.

*Methodology*

*General Population Study*

The results of this study are based on telephone interviews with adult residents of Florida, age 18 and over.

The respondents were selected through random digit dialing. A geographically distributed sample of telephone numbers was drawn from all areas of the state. To contact sample households, the last two digits of the listed numbers were dropped, and two digits from a random number table were substituted. This procedure allows any telephone household to be included in the sample, whether the number is listed or unlisted.

Only persons speaking from their residence were interviewed. Only one person was interviewed in each household.

To ensure demographic representation of the sample, stratified sampling was employed. In this method, a prescribed number of interviews within the various demographic strata are established so that each geographic area, age-group, sex, and race is sampled in proportion to its distribution in the population.



The questionnaire developed for use in this study was administered by telephone from our in-house WATS bank by professional interviews working under research supervision. All interviewing was conducted from November 5 through 8, 1987. The average interview required 12 minutes to complete.

*Direct Mail Recipients Study*

The 200 respondents for this study were among the approximately 184,000 addressees of direct mail legal advertising submitted to the Florida Bar from January through November, 1987.

The actual documents submitted to the Florida Bar by law firms and individual attorneys were shipped to Frank N. Magid Associates. This included photocopies of either the actual direct mail advertising letters or lists of names and addresses of intended recipients.
The documents were divided into three categories:

1. Personal injury letters mailed by lawyers who were termed "major filers."
2. Personal injury letters filed by all others (termed "miscellaneous").
3. Letters pertaining to issues other than personal injury.

There were a total of approximately 31,400 addressees of personal injury letters from major filers, 66,400 personal injury letters from other filers, and 85,900 non-personal injury letters for a total of 183,700.

To select as valid a random sample as possible, each file was gone through in detail. The law firm making each mailing, the month of the mailing, and the number of addressees of the advertising were recorded for each of the three categories. The personal injury-miscellaneous and

non-personal injury files were generally ordered by date of filing with the Florida Bar. The major filers were ordered by law firm first and then by date within each.

Based on conversations with staff of the Florida Bar and to interview an adequate number of people in each category, it was determined to sample about 75 personal injury-major filers, 75 personal injury-miscellaneous, and 50 non-personal injury.

A combination systematic/cluster sampling approach was taken to select sample respondents. Random mailing (i.e., all the addressees to which a particular letter was sent by a mailer at one time) were selected rather than individuals. All telephone numbers had to be requested from directory assistance. Because many names had no listing, a rather large number of names were needed to complete one interview.

Once a telephone number was obtained and the individual was reached, they were asked if they or their household had received advertising in the mail from a lawyer or law firm. If they said no, the interview was not conducted.

All interviews were conducted by telephone from the offices of Frank N. Magid Associates from December 8 through 10, 1987. The average length of interview was 16 minutes.

BEST AVAILABLE COPY

# AMICUS CURIAE

# BRIEF

MOTION FILED
DEC 11 1987

No. 87-16

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD D. SHAPERO,

*Petitioner,*

v.

KENTUCKY BAR ASSOCIATION,

*Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE RESPONDENT

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*Respondent.*

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THE SUPREME COURT OF KENTUCKY

## MOTION OF THE ACADEMY OF FLORIDA TRIAL LAWYERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Academy of Florida Trial Lawyers ("the Academy") respectfully moves, pursuant to Rule 36.3 of the Rules of this Court, for permission to file the attached brief amicus curiae in support of the respondent. Counsel for respondent has consented to the filing of the brief.[1] Counsel for petitioner has refused to consent.

The Academy is an association of over three thousand Florida attorneys specializing in all areas of litigation. However, the great majority of the Academy's members are engaged in the representation of plaintiffs in civil actions for personal injury and wrongful death.[2] The Academy, like other state trial lawyers' groups, is very much concerned about perceived and actual

1. The letter expressing consent has been filed with the Clerk of the Court.

2. The Academy's goals as stated in its Charter are, *inter alia*, to promote public safety and welfare while protecting individual liberties, Article II, Section 1(g), Charter of the Academy of Florida Trial Lawyers; to assure that the courts of the State of Florida remain accessible to every person for the redress of any injury and that the right to trial by jury remains inviolate, *id.*, Article II, Section 1(h), and to uphold the honor and dignity of the profession of law. *Id.*, Article II, Section 1(e).

abuses of lawyer advertising and solicitation; and is sensitive to the negative impact that attorney advertising and solicitation have had on the image of the plaintiffs' trial bar.

The Florida trial lawyers' experience with targeted direct mail solicitation goes beyond these general concerns, however, because in 1987, the Supreme Court of Florida adopted a rule specifically authorizing the direct solicitation of prospective personal injury clients by mail. Almost immediately upon adoption of the rule, reports of alleged abuses of direct mail solicitation began to occur. A Special Committee of the Florida Bar appointed to investigate these alleged abuses recommended on November 13, 1987 that the Florida rule be substantially modified so as to prohibit direct solicitation by mail of prospective clients. The issue posed in the present case is the constitutionality of such a phrophylactic ban on direct mail solicitation. As the organized plaintiffs' trial bar in Florida, the Academy is uniquely situated to provide the Court with important factual data regarding the impact of the Court's holding in this case. While the Florida experience is not directly before the Court, the Academy respectfully submits that the findings of the Florida Bar committee provide an appropriate and useful source of information as to how the Court's decision in this case will practically affect consumers of legal services as well as the nation's trial bar. *See, e.g., Regents* v. *Bakke*, 438 U.S. 265, 316-17, 321-24 (1978); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 56-57 n.111 (1973). Due to its very nature, this factual information may not be available to the Court unless it is presented by an amicus.

The Academy therefore respectfully moves the Court to grant leave pursuant to Rule 36.3 to file the attached brief amicus curiae.

Respectfully submitted,

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December 11, 1987

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THE SUPREME COURT OF KENTUCKY

## BRIEF AMICUS CURIAE OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF RESPONDENT

### INTEREST OF THE AMICUS CURIAE

The interest of the amicus is set forth fully in the accompanying motion.

### SUMMARY OF ARGUMENT

In *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978), the Court unanimously condemned an attorney's in-person solicitation of a prospective client as improper conduct which was subject to blanket prohibition by the state. The soliciting lawyer's limited commercial speech rights under the First Amendment were held not to protect such conduct; moreover, the prophylactic ban on in-person solicitation for pecuniary gain was held to be an appropriate means of regulation consistent with commercial speech doctrine.

By contrast, the Court has also made it clear that the states may not employ a blanket prohibition on general print media advertisements or on general *non*-targeted mailings and handbills

by attorneys—at least in the absence of a record showing that less restrictive regulations have proved inadequate. *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). Direct solicitation by mail falls somewhere between Mr. Ohralik's in-person discussions with his prospective clients and Zauderer's, Bates's and R.M.J.'s public, non-targeted print advertisements.

Intuitively, solicitation by mail should be more amenable to oversight than oral solicitation; and, to a degree, it certainly is. However, the data from Florida, where direct mail solicitation has been permitted since January 1, 1987, shows that personalized mail solicitation is in fact not subject to effective regulation. Although the format of solicitation letters can be pre-screened, the experience in Florida has shown that there is no meaningful way to determine whether the recipient's physical, mental or emotional state will result in the exertion of undue influence, overreaching or unwarranted invasion of privacy (particularly if the recipient is injured or is otherwise the victim of severe personal stress due to the event precipitating the solicitation); nor is there any meaningful way for the soliciting attorney to determine whether the recipient is already represented by counsel. The bulk purchase of accident reports and the use of computer-generated solicitation letters by attorneys in Florida have led to a crisis in the regulation of lawyer solicitation. As a result, the Florida Bar is currently moving to return to a prohibition of direct mail solicitation.

The Court has grounded its commercial speech decisions primarily on the value such speech provides to consumers. *See Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In the attorney advertising context, these decisions have ensured a free flow of information to the public about the availability and cost of legal services. No dearth of commercial information now exists regarding the availability of representation from those lawyers who choose to advertise, whether it be in the newspaper, in the yellow pages, on television



or on the radio. But when lawyers choose to solicit a specific prospective client for a specific fee-generating representation, an entirely new set of considerations becomes implicated; and, as consumers and attorneys in Florida have learned, this remains true even when the attorney's importunings for employment come through the mail. The very real problems with in-person attorney solicitation recognized in *Ohralik* apply with great practical effect to direct solicitation by mail. We respectfully urge the Court to affirm Kentucky's adoption of ABA Model Rule 7.3; or, alternatively, to limit the holding in the present case so that a state such as Florida may pursue prohibition of direct mail solicitation when less restrictive means of regulation have failed.

## ARGUMENT

### I.

### Kentucky's Adoption of the ABA Model Rule Prohibiting Direct Solicitation of Legal Employment by Mail Does Not Impermissibly Restrict the Petitioner's Commercial Speech Interests

Since the decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), in which the Court first held that attorney advertising is entitled to limited First Amendment protection as commercial speech, the Court has had a number of occasions to address the constitutionality of particular restraints on advertising and solicitation by attorneys. *See Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978). This case presents an additional unresolved question of great practical significance regarding the appropriate scope of state regulation of lawyer advertising: whether direct, targeted solicitation of an individual prospective client by mail for pecuniary gain may properly be prohibited. The issue turns on whether such conduct is analogous to direct, in-person solicitation, which the Court unanimously held to be the proper subject of a blanket prohibition in *Ohralik;* or whether such conduct is more similar to the type of general, non-individualized, non-targeted mailings

and print media advertisements at issue in *R.M.J.* and *Zauderer*. The question is important because targeted direct mail solicitation is in fact a widely used (and often allegedly abused) means of solicitation of personal injury clients, as well as other types of prospective clients. Based on recent experience with targeted, direct solicitation by mail, the Academy of Florida Trial Lawyers hopes to illustrate to the Court that, from a practical standpoint, the considerations that led to the approval of the ban of in-person solicitations in *Ohralik* also support prohibition of direct solicitation through the mails.

### A. This Case Should Be Decided According to the Principles Applied in *Ohralik* and *R.M.J.*

The factors which motivated the Court in *Ohralik* to approve a prohibition of in-person solicitation of clients for pecuniary gain may be summarized as follows:

1. The immediacy of direct, in-person solicitation as opposed to non-personalized public advertising. 436 U.S. at 457.
2. The lack of opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. *Id.*
3. The absence of a nonpecuniary motivation by the soliciting lawyer, such as was present in *NAACP* v. *Button*, 371 U.S. 415 (1963) and *In re Primus*, 436 U.S. 412 (1978).[1]
4. The states' legitimate and compelling interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." *Ohralik*, 436 U.S. at 462.
5. The likelihood that an unsophisticated or injured lay person may be distressed by the overtures of an uninvited lawyer "simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes." 436 U.S. at 465-66 (footnotes omitted).
6. The inherent difficulty in oversight and regulation by the state or by the legal profession of direct in-person solicitation. 436 U.S. at 466-67.

1. There is no suggestion in the present case that petitioner Shapero's motives in soliciting legal employment are anything other than for pecuniary gain; the state's regulation of his conduct should therefore be governed by *Ohralik* rather than *In re Primus*.



Because these factors were deemed to make any less restrictive means of regulation problematical, the Court upheld Ohio's blanket prohibition—despite the absence of a record showing that the state had first attempted any less restrictive means of regulation. As discussed below, Florida's experiment with direct mail solicitation has led to the very problems anticipated by the Court in *Ohralik*.

The direct solicitation at issue in *Ohralik* should be contrasted with the general, non-individualized mailing of professional announcements which Missouri sought to prohibit in *In re R.M.J.*, 455 U.S. 191 (1982). There, the Court held that the state had not made an adequate showing of justification for its blanket prohibition on non-targeted mailings by attorneys to the public. Significantly, however, the Court recognized that such *general* mailings may inherently present a more difficult problem for regulators than does media advertising. 455 U.S. at 206. Nevertheless, in the absence of any demonstrated inability to police such mailings, an absolute prohibition on *non*-targeted mailings was held to be overly restrictive:

> Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution.

*In re R.M.J.*, 455 U.S. at 206. Thus, from a practical point of view, the issue in this case is whether targeted, individualized solicitation of legal employment by mail implicates the same concerns that led the Court in *Ohralik* to approve a prophylactic ban; or, rather, whether direct solicitation by mail is so analogous

to handbills and professional announcements that a record of a failed attempt at less restrictive regulation will be required before a blanket prohibition may be employed.

**B. The Considerations Which Led the Supreme Court of Kentucky to Adopt the Model Rule Are Supported by the Florida Experience with Direct Mail Solicitation**

The Supreme Court of Kentucky in the present case modified its previous rule regarding direct mail solicitation for the stated purpose of conforming the rule to this Court's decisions. *Shapero* v. *Kentucky Bar Association*, 726 S.W.2d 299, 299-301 (Ky. 1987). The Kentucky court adopted the view embodied in the American Bar Association's Model Rule 7.3, which applies the ban on in-person solicitation approved in *Ohralik* to direct solicitation by mail as well. The court's stated grounds for adopting the model rule were the same factors that led this Court to approve the prophylactic ban on in-person solicitation at issue in *Ohralik*. As stated by the Kentucky Supreme Court, "dangers result from direct solicitation whether in-person or by mail." 726 S.W.2d at 301. This concern over the potential for intrusion and the inability to police such conduct effectively is entirely borne out by Florida's experiment with permitting direct targeted solicitation by mail.

Effective January 1, 1987, the Supreme Court of Florida lifted its ban on direct mail solicitation. *The Florida Bar re Rules Regulating the Florida Bar*, 494 So.2d 977 (Fla. 1986). As the petitioner correctly points out, many commentators and some courts have interpreted *Zauderer* and *R.M.J.* to preclude prohibition of direct mail solicitation. The Supreme Court of Florida followed this view in permitting such solicitation:

> [The rule], as originally proposed, prohibited direct mail solicitation of persons known to have specific legal problems. After studying this matter, we have concluded that such mailing cannot be prohibited. Instead, we have revised [the rule] to regulate, rather than proscribe, such communications. If this regulation proves unworkable or



> if a pattern of abuse in direct mailings is established, we will consider amending the solicitation rule.

494 So.2d at 978.[2]

Almost immediately upon the effective date of the rule change, certain attorneys began to purchase official accident reports and other public documents on a bulk basis and mailed targeted, direct, individualized letters of solicitation offering to represent persons involved in accidents. As later found by the Special Committee appointed to investigate abuses of direct solicitation:

> Within six months after the rule became effective, newspapers throughout the state began to report that accident victims, bereaved spouses and parents, and other victims of misfortune were being inundated with the mailed importunings of Florida lawyers. Newspapers also reported that police departments were being burdened by lawyers' demands for copies of accident reports and that some lawyers were engaged in illegal and unethical solicitation in-person, by telephone and through agents.

Final Report of the Special Committee on Solicitation of the Florida Bar (see the appendix to this brief).

By July 1987, the public outcry had reached a level that the president of the Florida Bar appointed a Special Committee on Solicitation to investigate the rapidly accumulating number of alleged abuses. The committee held fact-finding hearings throughout the State of Florida, researched newspaper accounts of improper solicitation and analyzed written comments and complaints received from the public and from attorneys.[3]

On November 13, 1987, the Special Committee on Solicitation reported its findings and made its recommendations to the Board

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2. The rule adopted by the Supreme Court of Florida is included in the appendix to this brief.

3. The committee also researched other states' regulatory efforts and the applicable federal case law. Although the committee's report is not a matter of record in this case, it is closely analogous to factual data relied upon and cited by the Court in other cases. *See, e.g., Regents* v. *Bakke*, 438 U.S. 265 (1978); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 56-57 n.111 (1973).

of Governors of the Florida Bar.[4] The committee's report is reprinted in full as an appendix to this brief. The committee made the following findings:

> Complaints from recipients of lawyers' direct mail solicitations demonstrate that such solicitation often causes the recipient emotional distress at a time when the recipient is, by virtue of the misfortune prompting the solicitation, particularly vulnerable.

Findings, Paragraph 5, Final Report of the Special Committee.

> The use of public records to identify individuals with a specific legal problem has burdened law enforcement agencies and has caused distress and unease among targets who did not realize that their identity and their legal problem were open to scrutiny and opportunistic use by strangers.

*Id.*, paragraph 6.

> Direct mail solicitation infringes on recipients' right to privacy as guaranteed by the Florida Constitution. This infringement is particularly egregious because it often occurs during periods of emotional stress.

*Id.*, paragraph 3.

The committee also investigated the enforceability of the current Florida rule, which attempts to regulate rather than proscribe direct mail solicitation:

> Direct mail solicitation cannot be effectively regulated because lawyers have no means of complying with the mandate of Rule 4-7.3 that solicitations not be mailed to anyone whose physical, mental or emotional state is such that they cannot make a reasoned decision whether to hire a lawyer. Similarly, in most instances lawyers have no means of determining whether an intended recipient has already retained counsel in the matter.

*Id.*, paragraph 4.

4. The Board of Governors of the Florida Bar will take up the recommendations for a final vote in January, 1988.



In addition, the committee found that direct mail solicitation has had a severe negative impact on the public's confidence in the civil justice system in Florida. *Id.*, paragraphs 1 and 2.

Based on these findings, the committee recommended that the Florida Bar petition the Supreme Court of Florida to return to the previous rule, which is essentially identical to the ABA Model Rule adopted by Kentucky and which is the subject of this case. The committee further recommended that general direct mail advertising continue to be permitted.

The Florida experiment with direct mail solicitation reflects that the dangers recognized by this Court in *Ohralik* and by the Kentucky Supreme Court in *Shapero* are not academic, theoretical possibilities—they are very real and very serious problems, and the potential for intrusion and abuse exists whether the solicitation is performed in person or through the mails. The plain fact is that a recipient of an attorney's letter is *not* free simply to disregard it:

> We do not perceive that a citizen receiving a letter written on stationery carrying an attorney's letterhead would be bold enough to discard it after only a casual perusal. Read it he must, for letters from attorneys carry a special aura of respect because of the state's power that attorneys can invoke, and the attorney's words carry a corresponding sense of authority.

*The Florida Bar* v. *Schreiber*, 407 So.2d 595, 598 (Fla. 1981).[5] When the recipient is an unsophisticated lay person who is approached in a moment of severe personal stress—whether it be as a result of an injury or death in the family or as a result of an impending foreclosure suit—the likelihood of improper influence and of causing great distress to the consumer is only heightened. *Compare Ohralik*, 436 U.S. at 465-66 *with Shapero*, 726 S.W.2d at 300-301 *and* Final Report of the Special Committee on Solicitation of the Florida Bar, Findings, paragraphs 5 and 6. Aside

5. *Schreiber* was decided before this Court's decisions in *R.M.J.* and *Zauderer*. Following *Zauderer*, the Supreme Court of Florida felt constrained to regulate, rather than proscribe, direct mail solicitation, leading to the regulatory crisis described in this brief.

from prohibition, regulation of direct mail solicitation is limited to screening the format of the soliciting attorney's letter (see Petitioner's Brief at 37-38)—there is no suggestion that any practical means exist of screening the *recipients* of the letters to avoid intrusion, emotional distress and overreaching.[6] Indeed, the Florida Bar committee found that it was virtually impossible for soliciting attorneys to comply with regulations intended to prevent communications with particularly vulnerable persons or with those already represented by counsel. (Findings, paragraph 4). The Academy therefore respectfully suggests that the distinctions between in-person solicitation and direct mail solicitation are outweighed by the very similar regulatory difficulties and by the potential for intrusion and overreaching inherent in both; and that, under *Ohralik*, Kentucky's adoption of ABA Model Rule 7.3 should be affirmed.

## II.

## Should the Court Conclude that the Record in this Case Does Not Adequately Justify Adoption of a Blanket Prohibition on Direct Mail Solicitation, then the Court Should Limit Its Holding so that the States May Continue to Adopt Regulations of Solicitation that Are Factually Justified

The Academy acknowledges that there is no record in this case establishing any ongoing pattern of actual abuse of direct mail solicitation by petitioner Shapero or by other Kentucky attorneys. However, the lack of such a showing is not necessarily fatal to Kentucky's adoption of the Model Rule:

> [T]he Court has made clear in *Bates* and subsequent cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive *or* where the record indicates that a particular form or method of advertising has in fact been deceptive. In *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 462 (1978), the Court held that the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" was so likely in the context of in-person solicitation, that such solicitation could be prohibited.

*R.M.J.*, 455 U.S. at 202 (1982) (emphasis added). Indeed, in *Ohralik* there was no record of ongoing abuse by soliciting attorneys in Ohio; rather, the Court upheld the ban on in-person solicitation because of the dangers "inherent in a lawyer's in-person solicitation of professional employment." 436 U.S. at 468. On the other hand, in cases such as *Zauderer* and *R.M.J.* involving public advertising that is *not* inherently fraught with regulatory difficulty or the possibility of vexatious conduct, the Court has stricken restrictions where the state failed to establish an adequate record to justify the particular regulation at issue.

The Academy respectfully suggests that, should the Court determine that Kentucky's adoption of the model rule prohibiting direct mail solicitation is not supported by an adequate record establishing actual abuse, then the Court should limit its holding, as in *Zauderer*, *R.M.J.* and *Bates*, to make it clear that the states are authorized to regulate this type of solicitation with carefully drawn restrictions; and that, if a particular record of abuse establishes that effective regulation of direct mail solicitation is not available by less restrictive means, then prohibition may be appropriate.

6. There is no particular reason to believe that the receipt of a personalized letter from an attorney in one's home is any less intrusive than electronic media advertising, which the Court has recognized as presenting "special problems [that] will warrant special consideration." *Bates*, 433 U.S. at 384. *Cf. Committee on Professional Ethics* v. *Humphrey*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 106 S.Ct. 1626 (1986) (strict regulations of attorney television advertising permissible under *Zauderer*).

## CONCLUSION

For the foregoing reasons, the Academy of Florida Trial Lawyers respectfully urges the Court to affirm the decision of the Supreme Court of Kentucky. Alternatively, the Court should limit its opinion to provide that a state may permissibly prohibit attorneys' direct solicitation of prospective clients by mail where such a restriction is justified by an appropriate record.

Respectfully submitted,

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December 11, 1987

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# SPECIAL COMMITTEE ON SOLICITATION
# FINAL REPORT

Summary of recommendations: Targeted direct mail solicitation should be abolished; new restrictions should be imposed on general direct mail advertising; forfeiture of fees should be added to the Bar's disciplinary arsenal for cases establishing improper solicitation; and The Florida Bar should file an amicus brief in *Shapero* v. *Kentucky Bar Association*, which is pending before the United States Supreme Court and which challenges an absolute ban on targeted direct mail solicitation.

## Background

The Special Committee on Solicitation was created in July and charged with the task of investigating reported improper or abusive solicitation by some members of The Florida Bar and with recommending measures to curb such misconduct. Specifically, the Committee was charged with determining:

1) Whether the Rules of Professional Conduct regulating solicitation conform to the mandate of the caselaw;
2) What time, place and manner restrictions are authorized or permitted by decisions of the United States Supreme Court;
3) What types of abuses, if any, have emerged in Florida;
4) What other states have done to regulate solicitation by lawyers; and
5) What amendments, if any, to the Rules and commentary are necessary and appropriate to conform the Rules to the mandate of the United States Supreme Court; to curb identified abuses; or to ensure that the public is protected from coercion, overreaching, deception or invasions of privacy on the part of soliciting lawyers.

In performance of this task the Committee has reviewed the caselaw, other states' regulatory efforts, newspaper accounts of improper solicitation and written comments and complaints submitted by members of the Bar and the public. In addition, the

Committee conducted public hearings in four cities in October to receive comments from members of the Bar and the public. On October 5, the day before the first of these public hearings, the United States Supreme Court granted certiorari in *Shapero* v. *Kentucky Bar Association.*

In its 1986 order adopting the Rules Regulating The Florida Bar, the Florida Supreme Court lifted the absolute ban on direct mail solicitation effective January 1, 1987. The court concluded that the ban was inconsistent with recent pronouncements of the United States Supreme Court. The Florida court stated, however, that if regulation of targeted direct mail solicitation, as provided for in Rule of Professional Conduct 4-7.3 (to be renumbered 4-7.4 effective Jan. 1, 1988), proved unworkable or a pattern of abuse was established, the court would consider amending the rule. 494 So.2d 977, 978.

Within six months after the rule became effective, newspapers throughout the state began to report that accident victims, bereaved spouses and parents, and other victims of misfortune were being inundated with the mailed importunings of Florida lawyers. Newspapers also reported that police departments were being burdened by lawyers' demands for copies of accident reports and that some lawyers were engaged in illegal and unethical solicitation in-person, by telephone and through agents.

As one of the first acts of his term, Bar President Ray Ferrero appointed this Committee to ascertain whether Florida lawyers were in fact abusing Rule 4-7.3 and what measures could be taken to halt any such abuses. The Committee filed an interim report with the Board of Governors at the September Board meeting. The report tentatively identified several amendments to Rule 4-7.3 that would be necessary to curb abuses and protect the public. The report further identified other measures under consideration. After further factfinding, this Committee has concluded that abuses by lawyers and harm to the public is inherent in direct mail solicitation and that, accordingly, the practice should be banned absolutely.



**Findings**

1) Most lawyers and nonlawyers oppose direct mail solicitation. This finding is supported by views expressed to Ray Ferrero during his speaking engagements before nonlawyer groups around the state, by informal polls of voluntary bar associations and sections of The Florida Bar, by letters to the editors of Florida newspapers, by newspaper editorials and by complaints received by The Florida Bar from lawyers and recipients of solicitation letters.

2) Direct mail solicitation has generated considerable negative publicity and condemnatory editorials for the legal profession and has caused public respect for and confidence in the profession and the court system to plummet. More than one Florida personal injury lawyer has encountered hostility or cynicism on the part of prospective jurors during voir dire, which suggests that innocent plaintiffs with meritorious claims may be injured by direct mail solicitation.

3) Direct mail solicitation infringes on recipients' right to privacy as guaranteed by the Florida Constitution. This infringement is particularly egregious because it often occurs during periods of emotional stress.

4) Direct mail solicitation cannot be effectively regulated because lawyers have no means of complying with the mandate of Rule 4-7.3 that solicitations not be mailed to anyone whose physical, mental or emotional state is such that they cannot make a reasoned decision whether to hire a lawyer. Similarly, in most instances lawyers have no means of determining whether an intended recipient has already retained counsel in the matter.

5) Complaints from recipients of lawyers' direct mail solicitations demonstrate that such solicitation often causes the recipient emotional distress at a time when the recipient is, by virtue of the misfortune prompting the solicitation, particularly vulnerable.

6) The use of public records to identify individuals with a specific legal problem has burdened law enforcement agencies and has caused distress and unease among targets who did not realize that

their identity and their legal problem were open to scrutiny and opportunistic use by strangers.

**The Case Law**

As a general rule, lawyer advertising that is not false or deceptive and does not concern unlawful activities can be restricted only in the service of a substantial governmental interest and only through the least restrictive means. In 1982 the United States Supreme Court struck down a state's absolute ban on direct mail advertising by lawyers because *there was no showing that less restrictive regulation would be insufficient* to serve legitimate interests of the state. *In re R.M.J.*, 455 U.S. 191. The Court has yet to rule on targeted direct mail solicitation. However, the Court has upheld a prophylactic ban on in-person solicitation in circumstances in which fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct are likely to occur. *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 462. *Ohralik* involved in-person solicitation of accident victims. The Court recognized that in the absence of an absolute ban, in-person solicitation would be virtually immune to effective oversight and regulation.

Some authorities have interpreted *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S.Ct. 2265 (1985), as signaling that an absolute ban on direct mail solicitation of prospective clients known to have specific legal problems will fall. *Zauderer* involved a newspaper advertisement that solicited and gave legal advice to prospective clients who had a particular cause of action. The Court in *Zauderer* distinguished print advertising from in-person solicitation as usually posing much less risk of overreaching or undue influence and as not involving an invasion of privacy. The Court rejected Ohio's arguments for its prophylactic ban on advertisements that solicit and give legal advice because *there was no record to support the ban as necessary* to achieve legitimate interests of the state.

This Committee does not believe that *Zauderer* precludes an absolute ban on targeted direct mail solicitation where a state can



demonstrate that less restrictive regulation was tried but failed to effectuate the legitimate interests of the state. In this regard, two observations made by the Court in *Ohralik* with respect to in-person solicitation are applicable to targeted direct mail solicitation: First, the Court noted that the very plight of an unsophisticated, injured or distressed lay person "not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes." 436 U.S. at 465-466. Second, the Court recognized that "A lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income. A valid claim might be settled too quickly, or a claim with little merit pursued beyond the point of reason. These lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest." 436 U.S. at 461, n. 19.

This Committee is aware that the Supreme Court has held that the government cannot suppress potentially offensive speech if the captive audience has a means of avoiding such speech, and that recipients can avoid objectionable mail by discarding it unopened. *Bolger* v. *Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983). However, the Committee believes that this reasoning is invalid with respect to direct mail solicitation by lawyers: The basis for the Committee's position is that most lawyer solicitations are prompted by some misfortune involving the target, and the public is aware that such solicitations are motivated primarily by the lawyers' interest in the anticipated fees, with the result that the mere presence of a lawyer's solicitation letter in the target's mail box at a time of emotional stress is offensive to the target.

As noted previously, the Court has granted certiorari in *Shapero* v. *Kentucky Bar Association*, a case that tests the constitutional validity of a prophylactic ban on direct mail solicitation of clients known to have a specific legal problem or cause of action. It is widely expected that Kentucky's rule will fall because there is no record to support its necessity. This Committee, on the other hand, has compiled a record that demonstrates that many of the same evils inherent in in-person solicitation are inherent in direct mail solicitation. Thus the Committee recommends that The Florida Bar file an amicus brief in *Shapero* in an effort to persuade the United States Supreme Court to limit the reach and effect of its opinion should that opinion be adverse to Kentucky.

**Recommendations**

1) That the Florida Supreme Court revoke those provisions of Rule 4-7.3 that authorize targeted direct mail solicitation.

2) That *general* direct mail advertising continue to be permitted, as it was before January 1 under DR 2-104(B) of the Code of Professional Responsibility.

3) That the following requirements (drawn from the Committee's interim report) be adopted for general direct mail advertising:

a. The "advertisement" mark on the envelope and on the communication itself must appear in red and be at least one-fourth inch in size.

b. Direct mail communications may be sent only by regular mail, and not by registered mail, courier or other forms of restricted delivery.

c. The first sentence of the communication must state in capital letters, "If you have already retained a lawyer for this matter, please disregard this letter."

d. Lawyers may not state in direct mail communications that the communications have been approved by The Florida Bar or are permitted by The Florida Bar.



e. Lawyers mailing direct mail communications concerning personal injury law must enclose with their communications a copy of the Statement of Client's Rights set out in Rule 4-1.5, but with the signature line deleted. An explanation of the enclosure must be included in the advertisement. These documents are to be of the same type size as the advertisement letter.

f. No contract for representation may be mailed with the advertisement letter.

g. The advertisement must include a statement advising the client who will actually handle the case and/or trial of the matter. The advertisement also must include the statement required by new Rule 4-7.3 concerning the availability of a writing setting forth the qualifications and experience of the lawyer or law firm.

4) That the Board of Governors authorize a professional survey of the public to provide additional evidence of the impact of direct mail solicitation on public confidence in the legal profession and the court system and the impact on the administration of justice.

5) That The Florida Bar file an amicus brief in *Shapero* v. *Kentucky Bar Association*.

6) That the Board of Governors reaffirm that in-person solicitation by lawyers and their agents is both illegal and unethical, and reaffirm The Florida Bar's commitment to seeking both professional discipline and criminal prosecution of lawyers who engage in such practices.

7) That The Florida Bar seek amendment of the Rules of Discipline to authorize forfeiture of fees as an available disciplinary measure when improper solicitation by a lawyer or his agent is established. The amendment should provide that fees forfeited for improper solicitation should be paid over to the Client's Security Fund.

## RULE 4-7.3 OF THE RULES REGULATING THE FLORIDA BAR

(Adopted Effective January 1, 1987)

**4-7.3 Direct contact with prospective clients.**

(a) A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, or by other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of paragraph (b) of this rule.

(b) Written communication.

(1) Written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

a. Such written communications shall be plainly marked "advertisement" on the face of the envelope and at the top of each page of the written communication in type one size larger than the largest type used in the written communication.

b. A copy of each such written communication shall be sent to staff counsel at bar headquarters and another copy shall retained by the lawyer for three (3) years. If written communications identical in content are sent to two (2) or more prospective clients, the lawyer may comply with this requirement by sending a single copy together with a list of the names and addresses of persons to whom the written communication was sent to staff counsel at bar headquarters as well as retaining the same information.

(2) A lawyer shall not send, or knowingly permit to be sent, on behalf of himself, his firm, his partner, an associate, or any other lawyer affiliated with him or his firm a written communication to a prospective client for the purpose of obtaining professional employment if:

a. The written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;

b. It has been made known to the lawyer that the person does not want to receive such communications from the lawyer;

c. The communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

d. The communication contains a false, fraudulent, misleading, or deceptive statement or claim or is improper under rule 4-7.1; or

e. The lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

# AMICUS CURIAE

# BRIEF

Supreme Court, U.S.
FILED
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No. 87-16 (8)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD D. SHAPERO,
*Petitioner,*

v.

KENTUCKY BAR ASSOCIATION,
*Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

## BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

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No. 87-16

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1987**

RICHARD D. SHAPERO

*Petitioner*

v.

KENTUCKY BAR ASSOCIATION

*Respondent*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

## BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

## INTEREST OF AMICUS

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as amicus curiae in support of respondent Kentucky Bar Association. Letters from both parties granting consent to the filing of this brief have been filed with this Court.

ATLA is a voluntary national bar association of approximately 65,000 trial lawyers from every state in the U.S. and several foreign countries. ATLA members primarily represent injured victims in civil actions and defendants in criminal cases. They therefore play a direct role in making legal services available to consumers who may be inexperienced in obtaining legal representation and whose very need for legal services may make them particularly vulnerable to overreaching and other harms associated with solicitation of clients.

ATLA members therefore have a strong professional interest in assuring a free flow of information that the public needs to make

informed and reliable decisions about legal services while protecting consumers and the integrity of the bar from abusive solicitation.

In this case, an attorney sought to mail letters to individuals facing foreclosure, holding out the possibility that they could obtain relief under federal law and recommending himself for employment in the matter. ATLA strongly feels that the practice of targeted direct mail solicitation, involving solicitation which is directed to individuals known to have a specific need for legal services, poses potential harm to the public which the state can legitimately prevent.

## SUMMARY OF ARGUMENT

Ten years ago, this Court held that the First Amendment affords some measure of protection to attorney advertising of the price, nature and availability of routine legal services. The foundation for this protection is a balancing of interests. Where the public's right to the availability of information concerning legal services outweighs the state's interests in protecting the public and the professionalism of the bar, the state may carefully regulate, but may not prohibit, attorney communication. "Advertising" is that communication which is protected commercial speech because the public's interest in the free flow of information predominates. By definition, the commercial speech doctrine applies to communications directed to the public at large.

On the other hand, this Court has held that "solicitation" is entitled to far less protection under the First Amendment. As this Court has made clear, the distinction between solicitation and advertising does not lie in the content of the communication. Rather, solicitation is directed to an individual known to have a specific legal need. A ban on personal solicitation does not appreciably affect the availability of information to the public. It is, instead, a regulation of the conduct of attorneys, a regulation as to the time, place, or manner of speech. This Court has held that a state may prohibit solicitation under circumstances that pose harms which the state has a legitimate interest in preventing.



This Court has specifically found that in-person solicitation poses a significant potential for overreaching and undue influence, invasion of privacy, and conflict of interest. These harms are also associated with targeted direct mail solicitation. Such solicitation also undermines the professionalism of the bar. The same principles that led this Court to hold that a blanket ban on in-person solicitation for profit does not violate the First Amendment also supports a prohibition of targeted direct mail solicitation.

The prohibition on targeted direct mail solicitation incorporated into Model Rule of Professional Responsibility 7.3 is a reasonable restriction on attorney communication regarding legal services. Less restrictive measures are simply unworkable in the context of targeted direct mail solicitation. Moreover, since this Court has extended First Amendment protection to a broad category of advertising to the general public, a ban on personal solicitation leaves ample alternative means to communicate to consumers the information they need to make an informed decision to seek legal representation.

Because the Kentucky Supreme Court's adoption of Rule 7.3, prohibiting the type of targeted direct mail solicitation that petitioner sought to employ, does not offend the First Amendment, Amicus urges this Court to uphold the decision below.

## ARGUMENT

### INTRODUCTION

The legal profession has long condemned the personal solicitation of clients commonly known as "ambulance chasing." Such unethical conduct still occurs on occasion, and its practitioners are properly subject to discipline by the state bar. However, technological advances in word processing and sophisticated direct marketing techniques make it possible for an attorney to send tens, hundreds, even thousands of individualized letters to potential clients, each letter speaking personally to the addressee concerning his specific legal problem and need for the sender's services. Targeted direct mail enables a soliciting attorney to

deliver a private, polished, and persuasive appeal for employment to far more accident victims, criminal defendants, or victims of financial setback than he could ever reach in person. The only real limit for the attorney is the number of names of such individuals that the attorney can obtain for a mailing list.

For an accident victim, an arrestee, a person in financial difficulty, or having some other potential need for legal services, there are many sources of information. Newspaper ads, telephone directories, even television commercials allow reasoned comparison and intelligent choice. People with problems are simply not fair game for lawyers selling their services. They need not endure the uninvited attorney on the doorstep. May the state not also protect its citizens from being beseiged by "personal" offers of representation through the mails?

The facts in this case and proceedings below are fully set out in the Kentucky Supreme Court's opinion, *Shapero* v. *Kentucky Bar Ass'n.*, 726 S.W.2d 299 (Ky. 1987). Attorney Shapero proposed to send a letter to persons against whom mortgage foreclosure suits had been filed. The text of the letter was not quoted by the court, but was reproduced by Shapero in his petition for certiorari in this Court. Following a personalized greeting, the body of the letter in its entirety stated:

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by *ORDERING* your creditor to *STOP* and give you more time to pay them.
>
> You may call my office anytime from 8:30 a.m. to 5:00 p.m. for *FREE* information on how you can keep your home.
>
> Call *NOW*, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember, it is *FREE*, there is *No* charge for calling.

Pet. for Cert. at 4 (emphasis in original).



The Kentucky court replaced its prior rule against written solicitation with Rule 7.3 of the Model Rules of Professional Conduct, adopted by the American Bar Association in 1983. That Rule states:

> Direct Contact with Prospective Clients
>
> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person, or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

The Kentucky court noted that *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447 (1978) "held that the in-person solicitation of business by a lawyer was so fraught with potential wrongdoing and so difficult to police that it justified the establishment of a prophylactic measure preventing it." 726 S.W. at 301. While general advertising does not pose this potential for abuse, "such dangers result from direct solicitation whether in person or by mail." *Id.* The court concluded that the state could, under Rule 7.3 and consistent with the First Amendment, prohibit "solicitation by direct targeted mailing sent to potential clients known to have a specific legal problem." *Id.* at 300.

## I.

## PETITIONER'S TARGETED DIRECT MAILING CONSTITUTES PERSONAL SOLICITATION, NOT PROTECTED COMMERCIAL SPEECH.

### A. Attorney advertising enjoys limited First Amendment protection as commercial speech.

Until relatively recently, the organized bar prohibited its members from both advertising and solicitation. *See*, Ringleb, Bush, and Moncrief, *Lawyer Direct Mail Advertisements: Regulatory Environment, Economics and Consumer Perceptions*, 17 Pacific L.J. 1199, 1202-06 (1986); Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 Yale L.J. 1181, 1182-86 (1972); Note, *Advertising, Solicitation and Legal Ethics*, 7 Vand. L. Rev. 677 (1954). The distinction between them has traditionally been a matter of content: Advertising disseminates information, while solicitation recommends oneself for employment. *See, e.g.*, Code of Professional Responsibility DR 2-103(A) (1981). These prohibitions were incorporated into the American Bar Association Code of Professional Responsibility and were adopted in virtually every state in accordance with the prevailing notion that, as this Court stated in *Valentine* v. *Christensen*, 316 U.S. 52 (1942), the First Amendment does not protect commercial speech.

This notion was dramatically overthrown in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). The holding in *Bates* was fairly narrow: A state may not wholly prohibit newspaper advertising by attorneys of the prices of routine legal services. In arriving at this conclusion, the Court established three principles that would provide the foundation for evaluating permissible state regulation of attorney expression. First, the relevant First Amendment interest at stake is "the consumer's concern for the free flow of commercial speech . . . which serves individual and societal interests in assuring informed and reliable decisionmaking." 433 U.S. at 365. It is the public's right to know, not the attorney's right to speak, that justifies the constitutional protection.



The second principle is that, unlike the generous protection accorded noncommercial speech, First Amendment protects commercial speech only to the limited extent that this interest in the free flow of information outweighs the state's undisputed interests in protecting the public and ensuring the integrity of the profession. The Court later summarized *Bates* as holding "that the justifications for prohibiting truthful, 'restrained' advertising concerning 'the availability and terms of routine legal services are insufficient to override society's interest, safeguarded by the First and Fourteenth Amendments, in assuring the free flow of commercial information." *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447, 454 (1978). Based on this balancing of interests, the Court "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Id.* at 457.

Third, the Court stated, "As with other varieties of speech, there may be reasonable restrictions on the time, place, and manner of advertising." *Bates*, 433 U.S. at 385.

The Court further refined its analysis in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), setting out a four-part test to determine whether commercial speech is protected by the First Amendment. This Court has summarized what has become known as the "commercial speech doctrine" as follows:

> The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest . . . Our application of these principles to the commercial speech of attorneys has led us to conclude that blanket bans on price advertising by attorneys and rules preventing attorneys from using

nondeceptive terminology to describe their fields of practice are impermissible.

*Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265, 2275 (1985). The commercial speech doctrine, in the view of one commentator, requires "intermediate" scrutiny of rules that affect the public right to information, as distinguished from the rational-basis test generally applied to economic regulation. Note, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: The Consumer Loses With the Zauderer decision*, 65 N.C.L. Rev.170, 176-84 (1986).

To what types of communication does the commercial speech doctrine apply? The Court has made it clear that "advertising pure and simple" falls within this category. *Zauderer*, 105 S. Ct. at 2275. Solicitation, the Court hinted as early as *Bates*, does not. *See Bates*, 433 U.S. at 367 ("we also need not resolve problems associated with in-person solicitation of clients") and at 371, n.20 (noting that the medical profession distinguishes between permissible advertising and unethical solicitation of patients).

It is clear from this Court's decisions that the distinction between advertising and solicitation is constitutionally significant. But this distinction does not lie in the content of the speaker's message. As this Court pointed out, "all advertising is at least implicitly a plea for its audience's custom." *Zauderer*, 105 S. Ct. 2265, 2276 (1985). Rather, the category of "advertising" is defined by the balancing of interests which justifies First Amendment protection. In other words, a communication is "advertising," and therefore protected by the intermediate scrutiny of the commercial speech doctrine, where the public interest in access to information outweighs the state's interests in preventing the communication. Amicus suggests that the public interest can only predominate where the communication is made to the public.

In its decisions following *Bates*, this Court has applied the commercial speech doctrine only to communications made to the



public-at-large. In *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265 (1985), the Court determined that newspaper ads that explicitly offered to represent defendants in drunk driving cases and women injured by the Dalkon Shield IUD were advertisements within the commercial speech doctrine. The Court specifically rejected Ohio's categorization of the communication as solicitation based on the self-recommendation contained therein. Instead, the Court sharply distinguished "print advertising" from a "personal encounter" with the attorney. 105 S. Ct. at 2277. Likewise, *In re R.M.J.*, 455 U.S. 191 (1982), applied the commercial speech doctrine to newspaper advertisements, advertising in telephone directories, and to general mailings of announcement cards, holding that the State may regulate such public communication only by the least restrictive means. *Id.* at 207.

This Court extended First Amendment protection to commercial speech because such speech communicates valuable information to the public. There is no principled basis for extending this protection to communications which are not directed to the general public.

**B. Attorney solicitation is conduct, not within the protection afforded commercial speech.**

A year after *Bates*, this Court was faced with the far different situation of attorney communications that were not directed to the general public, but to a person who was known to the attorney to have a specific legal problem. In *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447 (1978), an attorney visited one auto accident victim in her hospital room and another at home and persuaded them to retain him in actions to recover compensation for their injuries. *In re Primus*, 436 U.S. 412 (1978) involved a woman who was sterilized as a condition for receiving Medicaid assistance. The attorney sent the woman a letter offering free legal representation by the American Civil Liberties Union in a lawsuit. Both attorneys were disciplined and appealed to this Court.

The Court quickly erased any speculation that the recent extension of the commercial speech doctrine to attorney advertising also encompassed personal solicitation of clients. As the Court stated at the opening of its discussion in *Ohralik*, "The balance struck in *Bates* does not predetermine the outcome in this case." 436 U.S. at 455. The Court sharply distinguished solicitation from advertising. "[I]in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment." *Ibid.*

The Court specifically rejected the notion that the communications with prospective clients served the same function as the advertisement in *Bates* simply because it imparted information. *Id.* at 456. Instead, the Court reasserted its teaching that the scope of First Amendment protection is to be found by balancing the public and the state interests. A ban on solicitation of individuals with specific legal problems did not appreciably affect society's interest in the free flow of commercial speech since it did not prevent the attorney from disseminating information. It "merely prohibited him from using the information as bait with which to obtain an agreement." *Id.* at 459. The consumer's access to information regarding legal services was not diminished, particularly since "the advertising permitted under *Bates* will provide a further source of such information." *Id.* at 459, n.15. On the other side of the balance, "The State interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions." *Id.* at 461.

In the absence of any significant public interest in private communication, the Court classified solicitation as conduct, rather than commercial speech. More precisely, it is "a business transaction in which speech is an essential but subordinate component." *Id.* at 458. The state's power to regulate such conduct



is fairly broad, since "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 457. The Court concluded that "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." *Id.* at 460.

Under this broad authority, "the State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." *Id.* at 450. Moreover, the State is not limited to narrowly drawn rules to punish actual harm, but may impose a blanket ban on solicitation as a prophylactic measure designed to prevent harm before it occurs. *Id.* at 465.

In *Ohralik*, the attorney engaged in blatant in-person solicitation. However, it was not the face-to-face character of the contact which removed attorney Ohralik's conduct from the realm of protected commercial speech and placed it in the category of solicitation. Instead, it was the fact that Ohralik's communication was directed at a person known to have a specific legal problem, rather than to the general public.

In *In re Primus*, 436 U.S. 412 (1978), this Court made it crystal clear that "solicitation by letter" is still solicitation which a state may not only regulate but prohibit. This Court reversed the sanction against Primus, not because her letter was at all protected by the commercial speech doctrine, but because, under the circumstances of that case, the sanction impinged on associational rights under the First Amendment. The Court left no doubt that, had Primus' letter been motivated by pecuniary gain, it would have been subject to the same broad state authority as Ohralik's in-person solicitation.

> At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all

> solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction"... (citing *Ohralik*). In the context of political expression and association, however, a State must regulate with significantly greater precision.
>
> The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar ... The State's special interest in regulating members whose profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence.

436 U.S. 437-38 (citations omitted).

Although the Court noted that the harm posed by Primus' letter was not as great as that presented by Ohralik's in-person solicitation, 436 U.S. at 436-37, the Court did not thereby elevate Primus' communication to the status of commercial speech. It remained "solicitation by letter." *Id.* at 440. The Court's purpose in making the distinction was merely to show that the "manner of solicitation in this case" was no more harmful than the solicitation in *NAACP* v. *Button*, 371 U.S. 415 (1963), which was protected by the right of association. *Id.* at 437. Rule 7.3 is expressly limited to solicitation motivated by pecuniary gain.

*Ohralik* and *Primus* plainly establish that an attorney's communication, whether in person or in writing, to a person known to have a specific legal problem for the purpose of procuring employment is solicitation. It is not "advertising" protected by the commercial speech doctrine, but is conduct which is subject to reasonable restriction as to time, place, or manner. The question is whether written solicitation poses the types of harm that the state has a right to prevent and whether a prophylactic ban of such conduct is reasonable.



**C. Petitioner's letter constitutes personal solicitation.**

The letter petitioner sought to use in this case is an example of targeted direct mail directed to an individual known to have a specific legal problem. The American Bar Association amended its proposed rules governing such communication several times, taking great care to give effect to the First Amendment mandates. The final version conforms to this Court's decisions in *Ohralik* and *Primus*.

> The ABA House of Delegates rejected the theory that targeted mailed material is unlikely to result in overreaching. Accordingly, it reclassified mailed communications as "solicitations," on the theory that since there is no public scrutiny of private mail communication, such communication is more subject to abuse. Rule 7.3, as adopted, in other words, distinguishes between material generally disseminated to a public audience (which is advertising and is generally permissible) and that addressed to specific persons about a more or less specific legal matter (which is solicitation and is prohibited).
>
> G. Hazard and W. Hodes, The Art of Lawyering: A Handbook on the Rules of Professional Conduct 525 (1985).

Since it is the state courts which are charged with the responsibility of regulating the practice of law in the states, it is highly persuasive that nearly every state court that has addressed the issue of targeted direct mail by attorneys has viewed it as solicitation which may be prohibited under this Court's teaching in *Ohralik* and *Primus*.

In *State* v. *Moses*, 231 Kan. 243, 642 P.2d 1004 (1982), an attorney had obtained from the Realtors Multiple Listing the names of 150 persons who were in the process of selling their homes. He mailed letters personally addressed to those persons, offering his services in connection with the sale. The Kansas Supreme Court, upholding the sanction of the lawyer, adopted this Court's distinction between protected advertising and "personal" or "direct" solicitation. The court held that the state could reasonably prohibit "direct solicitation of a stranger by an

attorney for employment for a particular legal matter." 642 P.2d at 1007.

In *Allison* v. *State Bar Ass'n.*, 362 So. 2d 489 (La. 1978), where attorneys were disciplined for sending letters to employers offering their services in setting up prepaid legal services plans, the court stated, "The solicitation by mail was not as fraught with as many undesirable possibilities as face-to-face solicitation, but it was direct solicitation, nevertheless. And because the offer was privately made, and not in the public domain like the advertising approved in the *Bates* case, for all to see, it would be more difficult to regulate to prevent abuses," justifying a prophylactic ban on such contact. 362 So. 2d 496.

Similarly, in *The Florida Bar* v. *Schreiber*, 407 So. 2d 595 (Fla. 1982), where an attorney sent a letter to a trading company recommending himself for employment in immigration matters, the court held that direct mail solicitation was not protected advertising, but presented the same potential for harm as in-person solicitation, and could therefore be proscribed. 407 So. 2d at 598.

In *Adler, Barish, Daniels, Levin & Creskoff* v. *Epstein*, 482 Pa. 416, 393 A. 2d 1175 (Pa. 1978), the Pennsylvania Supreme Court held that an attorney's mail solicitation of the clients of his former law firm was not protected by *Bates*, but could be prohibited as posing the same public harms as the in-person solicitation in *Ohralik*.

In a case involving conduct quite similar to that at issue before this Court, *Dayton Bar Ass'n.* v. *Herzog*, 70 Ohio St. 2d 261, 436 N.E.2d 1037 (1982), the court upheld the discipline of an attorney who sent letters to persons listed as defendants in collections cases in the "Daily Court Reporter." The letter stated, "There is a new federal law that can save your job, car, bank account, stop repossessions and garnishments and gas and electric turn-offs," and encouraged the recipient to call the attorney's office. The Ohio Supreme Court held, "This patent solicitation is not the type of constitutionally protected commercial speech discussed in *Bates* . . . Rather, respondent's letters create a 'potential for



overreaching . . . and a need for prophylactic regulation in furtherance of the state's interest in protecting the lay public,'" under *Ohralik*. 436 N.E.2d at 1038.

Finally, in *In re Frank*, 440 N.E.2d 676 (Ind. 1982), the Indiana Supreme Court upheld the discipline of an attorney who obtained the names of unrepresented defendants in drunk driving cases from court records and sent 20 such persons letters advising them of his expertise and availability to represent them in such matters.

The only state court to strike down a blanket prohibition of targeted direct mail solicitation is *In re Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838 (1984), cert. denied, 105 S. Ct. 2701 (1985). The attorney there sent letters to the victims and families of victims of the collapse of the sky-walk at the Kansas City Hyatt Regency Hotel. The court rejected the distinction between advertising and solicitation as "of little help." The court held that the blanket prohibition of solicitation violated the commercial speech doctrine because less restrictive means existed to prevent potential harms. *See also Koffler* v. *Joint Bar Ass'n.*, 51 N.Y.2d 140, 412 N.E.2d 927, cert. denied, 450 U.S. 1026 (1980). Several federal courts have proceeded along the same vein. *See Adams* v. *Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, 801 F.2d 968 (7th Cir. 1986) (direct solicitations mailed to persons with debt problems constitutes "advertising" which cannot be prohibited under the commercial speech doctrine); *Spencer* v. *Honorable Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Pa. 1984), *affirmed without opinion*, 760 F.2d 261 (3d Cir. 1985) (targeted direct mail is advertising); *Bishop* v. *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n.*, 521 F. Supp. 1219 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982)(similar).

These decisions are not persuasive. First, they ignore the constitutional distinction between public communication, which is protected by virtue of its contribution to the free flow of information to consumers, and private communication which does not.

In addition, the courts' reasoning heavily depends upon the presumption that written communication does not pose the same dangers as in-person solicitation. A closer examination of targeted direct mail, as amicus undertakes in the following section, demonstrates that it presents the same potential dangers that this Court has associated with in-person solicitation.

## II.
## A STATE MAY PROHIBIT TARGETED DIRECT MAIL SOLICITATION

### A. A ban on in-person solicitation does not violate the First Amendment.

This Court has explicitly held that "the State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." *Ohralik*, 436 U.S. at 450.

The prohibition against solicitation serves "to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary interest." *Id.* at 462. The "protection of the public from these aspects of solicitation is a legitimate and important state interest." *Id.* at 463. In the context of in-person solicitation, the Court held that the state interest justified a blanket ban on such solicitation as a prophylactic measure to prevent harm before it occurs. *Id.* at 465.

Amicus submits that targeted direct mail of the type which petitioner sought to use and is prohibited by Rule 7.3 poses the same danger to the public which the Court identified in *Ohralik*. While written solicitation may not as openly harmful to the public as in-person solicitation, amicus suggests that these dangers are sufficiently great that a state may, if it deems it necessary, prohibit targeted direct mail solicitation. Moreover, amicus submits, these harms are inherent in the very nature of targeted direct mail solicitation, so that a state need not await empirical



proof of actual harm before imposing a prophylactic ban on such solicitation.

### B. Targeted direct mail carries the same potential for harm as in-person solicitation

#### 1. Overreaching and Undue Influence.

This Court identified one of the primary evils of in-person solicitation as the danger of exerting undue influence on the lay person. "The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking" and "discourage persons needing counsel from engaging in a critical comparison of the availability, nature, and prices of legal services." *Ohralik*, 436 U.S. at 457.

A look at the letter which petitioner sought to use demonstrates precisely this danger:

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by *ORDERING* your creditor to *STOP* and give you more time to pay them.
>
> You may call my office anytime from 8:30 a.m. to 5:00 p.m. for *FREE* information on how you can keep your home.
>
> Call *NOW*, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember, it is *FREE*, there is *No* charge for calling.

(emphasis in original).

As the most cursory reading of this letter reveals, the sales pitch in a written solicitation can be at least as overbearing as an in-person contact. The letter makes effective use of both the threat of imminent harm and "a cost-free and therefore irresistible offer." *Ohralik*, 436 U.S. at 468.

Amicus submits that the potential for overreaching and undue influence is inherent in the nature of solicitation, whether in

person or in writing, in which a trained advocate focuses his skills on an individual known to have a legal problem. As this Court has stated, "the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence." *Ohralik*, 436 U.S. at 466. If anything, lawyers are more highly trained in persuasive writing than in oral presentation and the state may rightly fear that the persuasive power of trained advocates "may be as potent in writing as it is in person." *In re Primus*, 436 U.S. at 446 (Rehnquist, dissenting).

A second reason for viewing targeted direct mail solicitation as posing the same dangers of overreaching and undue influence as in-person communication is that the very purpose of the written communication is to initiate an in-person contact. The addressee is urged to call or visit the attorney, which then subjects the lay person to all the potential dangers that, under *Ohralik*, the state has the right to prevent. *Cf. Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265, 2296 (1985)(O'Connor, J., concurring in part and dissenting in part)(while the risks of print advertisement are not as great as in-person solicitation, "the former is only one step removed from the latter.") Surely the state's legitimate interest in prohibiting an attorney from selling his wares on the potential client's doorstep also extends to banning written enticements designed to lure the individual into the attorney's own office.

**2. Invasion of privacy.**

The events that give rise to a need for legal representation are often unhappy ones. It may be that the person has lost a loved one, suffered personal injury, been accused of crime, experienced financial setbacks, or endured some other misfortune. Under



such circumstances, this Court stated, "the overtures of an uninvited lawyer may distress the solicited individual simply because of their intrusiveness and he invasion of the individual's privacy, even when no other harm materializes." *Ohralik*, 436 U.S. at 466.

It is certainly not unreasonable for a state to determine that its citizens would view the arrival of an attorney's letter, speaking directly to the individual's legal problem, as similarly intrusive. It may be argued that the recipient of a written solicitation can minimize this intrusion simply by tossing the letter in the waste basket. *See, e.g., Spencer* v. *Honorable Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880, 890 (E.D. Pa. 1984); Note, *Professional Ethics: Direct Mailings by Attorneys to Target Audiences*, 16 Memphis St. U. L. Rev. 409, 416-17 (1986). While this may be true of general advertising circulars that arrive in the mail, a letter from an attorney that is personally addressed to the recipient is necessarily more intrusive. As the Florida Supreme Court explains, an individual is not likely to discard such a letter unread. "Read it he must, for letters from attorneys carry a special aura of respect because of the state's power that attorneys can invoke, and the attorney's words carry a corresponding sense of authority." *The Florida Bar* v. *Schreiber*, 407 So. 2d 595, 598 (Fla. 1982).

A second harm to privacy that is inherent in direct mail solicitation is the danger that the victim of a misfortune will be the recipient of not one, but dozens of solicitations. The more serious the injury or misfortune, the more likely that the victim will be solicited by letters from many interested lawyers. Even if each separate communication is framed in the least offensive manner, a citizen may well view a steady barrage of such solicitations as a species of harassment.

Finally, it must be recognized that freedom from offensive communications is but one aspect of privacy. Essential to the success of a targeted direct mail campaign is the compilation of a mailing list of persons who may have a specific legal problem. Life's misfortunes generate public records, more out of necessity

than choice by the victim. Court records, hospital admissions records, financial records are all more or less accessible to attorneys looking for person who might employ their services. Even without the overt opening "it has come to my attention," it is obvious to the recipient of a personal written solicitation that the attorney has been scrutinizing the recorded events of his life. Certainly a state may reasonably determine that its citizens would view such prying as an invasion of privacy. Indeed, in a recent study of consumer attitudes toward attorney advertising, respondents most strongly disapproved of attorneys obtaining the names and addresses of persons with possible legal problems for purposes of direct mailing. Ringleb, Bush, and Moncrief, *Lawyer Direct Mail Advertisements: Regulatory Environment, Economics and Consumer Perceptions*, 17 Pacific L.J. 1199, 1238-39 (1986).

If this court should give its imprimatur to such solicitation, it requires no great stretch of imagination to foresee the growth of marketing information companies who routinely sift through various records for the purpose of compiling mailing lists for sale to attorneys. For a summary of the art and science of the effective use of mailing lists, with citation to a variety of texts, *see* Stoltenberg and Whitman, *Direct Mail Advertising By Lawyers*, 45 U. Pitt. L. Rev. 381, 416-20 (1984).

### 3. Conflict of Interest

This Court has noted that "A lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests." *Ohralik*, 436 U.S. at 462, n.19. This type of conflict of interest is present in any solicitation, in person or in writing. *See Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265, 2296-97 (1985) (O'Connor, J., concurring in part and dissenting in part).



### C. The State has a strong interest in protecting the professionalism of the bar.

In *Ohralik*, this Court took care to point out, "The *Bates* Court did not question a State's interest in maintaining high standards among licensed professionals." 436 U.S. 462. Indeed, the "interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" 436 U.S. at 461, quoting *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975).

While this interest in professionalism did not outweigh the public's interest in general advertising, this Court ruled that a state could–properly ban in-person solicitation on this basis. *Ohralik*, 436 U.S. at 461-62. Amicus submits that a state may reasonably perceive the type of personal salesmanship embodied in petitioner's letter as detrimental to the professionalism of the bar and may therefore be prohibited.

## III.
## PROHIBITION OF TARGETED DIRECT MAIL SOLICITATION IS A REASONABLE RESTRICTION ON CONDUCT

### A. The harms of targeted direct mail solicitation cannot be prevented by means less restrictive than blanket prohibition.

This Court has emphasized, "The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its bar." *In re Primus*, 436 U.S. 412, 437 (1978). With respect to in-person solicitation, this Court held that a state need not await proof of actual harm to the solicited individual before taking action to protect members of the public and the professionalism of the bar. The strong state interests involved justified the adoption of "prophylactic measures whose objective is the prevention of harm before it occurs." *Ohralik*, 436 U.S. at 465. Amicus submits that the potential for overreaching, invasion of privacy, and conflict of interest also

supports the imposition of a prohibition against targeted direct mail solicitation.

In their comment to Rule 7.3, the ABA drafters squarely addressed the problems of regulating targeted direct mail:

> These dangers attend direct solicitation whether in-person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition. One proposed safeguard is to require that the designation "Advertising" be stamped on any envelope containing a solicitation letter. This would do nothing to assure the accuracy and reliability of the contents. Another suggestion is that solicitation letters be filed with a state regulatory agency. This would be ineffective as a practical matter. State lawyer disciplinary agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge, they cannot determine whether the lawyer's representations are misleading. In any event, such review would be after the fact, potentially too late to avert the undesirable consequences of disseminating false and misleading material.

Comment to Rule 7.3, reproduced in Hazard and Rhodes, *supra*, at 683-84.

Amicus would add that filing and review of solicitation materials does not redress the harm to privacy resulting from attorneys using public record as a mine for potential clients. Nor does it protect the widow or accident victim from being vexed by a steady barrage of letters from eager attorneys.

**B. There are adequate alternatives for assuring that consumers who may need legal services have adequate information.**

An important element in the reasonableness of any time, place, or manner restriction on speech is the availability of alternative avenues for expression. This Court has opened up many avenues through which attorneys can communicate the nature, price, and



availability of their legal services. The Court has extended First Amendment protection to advertising in newspapers, telephone directories, and other print media as well as to advertising through general mailings. See *In re R.M.J.*, 455 U.S. 191 (1982). Amicus submits that a prohibition against written solicitation of individuals known to have a specific legal problem is a narrowly drawn and reasonable means of advancing important state interests which does not preclude an attorney from communicating to the general public.

## CONCLUSION

For the foregoing reasons, amicus urges this Court to affirm the decision of the Kentucky Supreme Court.

Respectully submitted,

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December 18, 1987

# AMICUS CURIAE

# BRIEF

MOTION FILED
DEC 19 1987

(9)

No. 87-16

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD D. SHAPERO,

*Petitioner,*

v.

KENTUCKY BAR ASSOCIATION,

*Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE FLORIDA BAR IN SUPPORT OF THE RESPONDENT

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*Petitioner,*

v.

KENTUCKY BAR ASSOCIATION,

*Respondent.*

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Florida Bar moves for leave to file a brief in this action as Amicus Curiae in support of the position of the Respondent, pursuant to Rule 36.3 of the Revised Rules of the Supreme Court. The Respondent has consented to the filing of this brief, but the Petitioner has not consented. As grounds for this motion, The Florida Bar states:

1. The Florida Bar is an integrated bar, existing pursuant to the Constitution of the State of Florida as an administrative arm of the Florida Supreme Court. In accordance with rules adopted by the Florida Supreme Court, the Board of Governor's of The Florida Bar is authorized to propose revisions to the Rules of Discipline and Standards of Conduct for Florida attorneys.

2. On January 1, 1987, revisions to the Rules of Discipline permitted Florida attorneys, for the first time, to engage in direct mail advertising and solicitation. As a result of complaints and concerns arising after the amendment to the rules, The Florida Bar appointed a special committee to study the effects of such advertising and solicitation in Florida and, in addition, commissioned an independent agency to conduct surveys regarding direct mail advertising and solicitation.

3. As a result of the findings and recommendations of the special committee and the survey, The Florida Bar is currently

considering proposals for amendments to the Rules of Discipline in connection with direct mail advertising and solicitation. The Florida Bar has a deep interest in the outcome of this case and will be significantly affected by the opinion of this Court.

4. Counsel for the movant has read the Brief of Petitioner, the proposed brief of the Academy of Florida Trial Lawyers, and a rough draft of the Brief of Respondent and has determined that neither the information nor the legal arguments presented in the proposed amicus curiae brief filed herewith are covered by the other briefs.

5. In particular, the proposed brief of movant discusses the standard of review applicable to time, place and manner regulations on speech as the proper standard for review of the Kentucky rule. The brief analyzes the effect of applying such analysis to the Kentucky rule. In addition, the brief presents the results of a survey commissioned by The Florida Bar as illustrative of the type of factual information that states should be permitted to consider in determining whether or not restriction and/or prohibition of direct mail advertising is constitutionally permissible.


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No. 87-16

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1987**

RICHARD D. SHAPERO,

*Petitioner,*

v.

KENTUCKY BAR ASSOCIATION,

*Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

## BRIEF OF AMICUS CURIAE THE FLORIDA BAR IN SUPPORT OF THE RESPONDENT

### INTEREST OF THE AMICUS CURIAE

The interest of the amicus is set forth fully in the accompanying motion.

### SUMMARY OF ARGUMENT

The Kentucky rule is a limited time, place or manner regulation which is content-neutral. The standard applicable to a time, place or manner regulation is whether it serves a substantial governmental interest and leaves open ample alternative avenues of communication.

Even in the absence of a record, consideration of the nature of targeted, direct mail solicitation establishes that the Kentucky regulation meets that standard.

Studies of the results of Florida's experiment with direct-mail advertising have produced evidence that the State has a substantial governmental interest in prohibiting targeted direct-mail solicitation. If this Court decides that it cannot sustain the Kentucky regulation in the absence of a factual record, it should not

close the door to such regulations in the event that they are sustained by facts such as those developed in Florida.

## ARGUMENT

### I

### THE KENTUCKY RULE IS A LIMITED TIME, PLACE OR MANNER REGULATION WHICH SERVES SUBSTANTIAL STATE INTERESTS AND LEAVES AMPLE ALTERNATIVE AVENUES OF COMMUNICATION.

The Petitioner seeks to impose upon the State a more stringent standard of review than is properly applicable. The Petitioner urges this Court to apply the four-part test announced in *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, 447 U.S. 557, 341 (1980) and applied in *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico*, 478 U.S. , 106 S.Ct. , 92 L.Ed. 2d 266 (1986) and *In re. R.M.J.*, 455 U.S. 191, (1982). That test imposes upon the State the burden of showing that its regulation serves a substantial state interest and that it is the least restrictive means of serving that interest. The test has been utilized by this Court in cases where there has been a complete ban on particular speech, as in *Central Hudson* and *Posadas*, or where the regulation has been content specific, as in *R.M.J.*. This Court has consistently applied a different criteria to time, place and manner regulations which are "content-neutral". Under the test applied in such cases, the regulation will be upheld if it serves a significant governmental interest and leaves open ample alternative channels for communication of the information. The Court has placed less emphasis in such cases on the more demanding requirement that the regulation be the "least restrictive" means. Presumably, this is because the least restrictive criterion is obviated by the requirement for ample alternative means of communication and because the likelihood of abuse is considerably reduced when the regulation is content-neutral.



In its opinions analyzing restrictions on professional advertising, this Court has continued to recognize the applicability of a time, place and manner analysis in appropriate cases. Thus, in *Virginia Pharmacy Board* v. *Virginia Consumer Counsel*, 425 U.S. 748, 771 (1976), the precursor to *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), this Court stated:

> There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. . . .

In *Bates* itself, the Court recognized "that there may be reasonable restrictions on the time, place and manner of advertising." *Bates* v. *State Bar of Arizona*, supra at 384. The Court again recognized the applicability of the time, place and manner analysis in *Friedman* v. *Rogers*, 440 U.S. 1 at 9 (1979).

The meaning of "content-neutral" was addressed in the recent case of *City of Renton* v. *Playtime Theaters, Inc.*, U.S. , 89 L.Ed. 2d 29 (1986). In that case, this Court upheld a zoning ordinance which prohibited the location of adult movie theaters within 1,000 feet of residential property or of a church, park or school. The ordinance defined an adult movie theater as one which presented video presentations characterized by an emphasis on matter depicting "specified sexual activities" or "specified anatomical areas". Despite the limited application of the ordinance to theaters presenting sexually oriented movies, this Court found that the ordinance was content-neutral for purposes of First Amendment analysis. The Court stated:

> To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at

"adult motion picture theaters," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Counsel's "*predominate* concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves.

* * * * *

In short, the *Renton* ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech."

* * * * *

The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

[Emphasis by Court] Id. at L.Ed.2d 37,38.

As in *Renton*, the predominate concern reflected in the Kentucky regulation is not related to the content of the advertising, which Kentucky permits in other forms of attorney advertising, but with the secondary effects of targeted direct-mail advertising on the recipients and on the system of justice as a whole. Thus, the proper question before the Court in this case is whether Kentucky's prohibition of targeted direct-mail advertising by attorneys serves a substantial governmental interest and whether reasonable alternative avenues are available for attorneys to communicate appropriate information to the public.

Prior decisions of this Court have insured that there are ample alternative means of communication available in Kentucky and elsewhere. There is no suggestion in this case that Kentucky has attempted to unduly restrict the ability of attorneys to advertise through print or electronic media or non-targeted direct mail. The only thing Kentucky restricts is a very limited type of direct-mail advertising. The limited nature of the Kentucky regulation deserves special emphasis. The challenged rule does not attempt



to regulate the content of the message and does not even prohibit direct-mail advertising. It is solely a restriction on the *manner* in which the advertising is done. It cannot be directed to a *specific* individual as a result of a *specific* event. The same individuals can be reached by the same advertising vehicle containing all relevant information regarding the attorney and his available services.[1] Thus, the only question to be determined under the time, place and manner criteria is whether the State has a substantial interest in prohibiting targeted direct-mail solicitation. Unfortunately, the case comes to this Court without a record. Nevertheless, it is apparent from the nature of targeted direct-mail solicitation that the State has a substantial interest in prohibiting its use by attorneys.

Targeted solicitation is directed at individuals who have suffered a recent personal or business setback, often with tragic personal consequences, or have already become embroiled in legal proceedings. It does not require an evidentiary hearing to recognize that persons under such circumstances will often be in a stressful emotional state. A letter from an attorney directed at the specific circumstances that led to the stress presents the prospect of both an invasion of personal privacy and an exercise of undue influence over a person not capable of rendering an objective decision. Shapero argues that there is no difference in this regard between targeted and non-targeted direct-mail solicitation. In fact, there is a distinct difference between a general mailout advising the public of a lawyer's credentials and fields of practice without reference to a specific matter and, on the other-hand, a letter directed to a specific individual or group of individuals in connection with a particular occurrence. It is the personalization of targeted direct mail which distinguishes it

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1. The very limited nature of the Kentucky regulation, particularly when viewed against the time, place and manner standard, raises a legitimate issue as to whether or not a substantial question has been presented to this Court. The Court is respectfully urged to revisit this question and to consider whether the case should not be dismissed for failure to present a substantial question. See *Humphrey* v. *Committee on Professional Ethics and Conduct of the Iowa State Bar Association*, U.S. , 90 L.Ed. 2d 174 (1986).

from general mailings and invites the problems in which the State has a substantial interest.[2]

The State also has a substantial interest in avoiding the frivolous litigation which logic and common human experience suggest can be encouraged by direct-mail solicitation. In most cases, such mailings would necessarily be in response to information coming to the lawyer's attention through the news media or public records. The lawyer would ordinarily have no way of determining from such sources whether or not the prospective client has a viable case or is already represented by counsel. Nevertheless, the receipt of a lawyer's letter under such circumstances suggests, implicitly if not expressly, that the lawyer believes he can create a case regardless of whether or not one legitimately exists.

In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court rejected the argument that states have a right to regulate advertising generally in order to avoid stirring up litigation. There the Court disputed the suggestion that there is anything evil about litigation per se. However, the opinion in that case surely did not suggest that states do not have a substantial interest in discouraging frivolous litigation. A letter directed at a client in connection with a specific problem about which the lawyer has little or no actual knowledge is far more likely to encourage frivolous litigation than a general notice of the lawyer's background and availability.

There is an additional problem with targeted direct mail solicitation which this Court has already noted. In *Ohralik* v. *Ohio*

2. Rule 4-7.3 of the Rules Regulating The Florida Bar prohibits a lawyer from sending a written solicitation if the lawyer knows or should know that the person is already represented by another lawyer or if he knows that "the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgement in employing the lawyer." The rule is surely constitutional, but obviously unenforceable.



*State Bar Association*, 436 U.S. 447 (1978), the Court recognized the increased likelihood of conflict of interest when a lawyer solicits a particular representation:

> A lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income. A valid claim might be settled too quickly, or a claim with little merit pursued beyond the point of reason. These lapses of judgement can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits *a particular representation* does not create special problems of conflict of interest.

[Emphasis supplied] Id. at 462 n. 19. The heightened potential for conflict which this Court thus recognized in the case of personal solicitation is just as threatening in the case of targeted direct-mail solicitation. The problem arises not because the solicitation is in person, but because of the solicitation of "a particular representation". Like in-person solicitation, targeted direct-mail advertising seeks "a particular representation" and is just as likely to raise the prospect for conflict.

Finally, targeted direct-mail solicitation has a clear impact upon the professionalism of the Bar. In both *Virginia Pharmacy Board*, supra, and *Ohralik*, supra, the Court found that there was no evidence that general advertising had a negative effect upon the professionalism of pharmacists or lawyers. In both cases, however, this Court recognized the substantial interest which the State has in maintaining such professionalism. Thus, in *Virginia Pharmacy Board*, supra at 766, the Court stated:

> Arrayed against the substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists. Indisputably, the State has a strong interest in maintaining that professionalism.

Similarly, in *Ohralik*, supra at 462, the Court, referring to the cited language in *Virginia Pharmacy*, stated:

> While the Court in *Bates* determined that truthful, restrained advertising of the prices of "routine" legal services would not have an adverse effect on professionalism of lawyers, this was only because it found "the postulated connection between advertising and the erosion of *true professionalism* to be severely strained."

[Emphasis by Court] In *Bates*, the Court dealt only with "truthful restrained advertising" concerning the availability and terms of routine legal services. Id. at 384. The Court noted that similar advertising by bankers and engineers have not resulted in those professions being considered "undignified". However, targeted direct solicitation is an entirely different matter. The act of contacting a person in the midst of crisis or the wake of tragedy in a patent effort to benefit economically from such person's misfortune has long been condemned by society and is widely considered to be crass, insensitive and mercenary. It certainly does not comport with any concept of professionalism.

A loss of respect for the dignity of the legal profession would inevitably result in a loss of confidence in our system of justice as a whole. In short, the Court weighs here the very minimal imposition upon free speech posed by the Kentucky regulation against the substantial risk of threat to the foundation of an equally significant constitutional right, the right to due process of law.

## II

## IF THE COURT DETERMINES THAT THE KENTUCKY RULE CANNOT BE SUSTAINED IN THE ABSENCE OF A FACTUAL RECORD, IT SHOULD NOT FORECLOSE THE ABILITY OF STATES TO PROHIBIT TARGETED DIRECT-MAIL SOLICITATION IN THE FUTURE IF FACTUALLY JUSTIFIED.

If the Court decides that the Kentucky regulation cannot be upheld in the absence of a record, the Court is urged to include in



its opinion a recognition of the fact that states are not precluded from regulating or prohibiting targeted direct-mail solicitation in the future if evidence is produced to justify such regulation or prohibition. On January 1, 1987, the Florida Supreme Court amended the Rules Regulating The Florida Bar to permit direct-mail solicitation. *The Florida Bar re Rules Regulating The Florida Bar*, 494 So. 977 (Fla. 1986). As a result of alarming signals that began to surface shortly after adoption of the new rule, the President of The Florida Bar appointed a Special Committee on Solicitation to study the effects of the new rule.[3] The Florida Bar also commissioned an independent firm to conduct a survey of public responses to targeted direct-mail solicitation by attorneys. The findings, a copy of which are attached to this brief at Appendix 4-10, are significant.

The survey was based upon a representative sampling of the adult population in general and a sampling of the 184,000 persons who have already received direct-mail attorney advertising since Florida began to permit such advertising in January, 1987. Among other things, the survey found that a significant percentage of Floridians, including those who had received direct-mail solicitation, believes that such advertising contains minimal informational content and appeals to the emotions rather than to reason, that it promotes unwarranted or frivolous lawsuits, that it results in higher legal costs and that it belittles the legal profession. The vast majority of those surveyed said that they would select a lawyer that they knew personally or based upon recommendations of others, that they had enough information available to choose the best lawyer for their needs and that they did not think it would be difficult to find a lawyer when they needed one based upon sources other than direct mailing. A significant

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3. The findings of the Committee are included at Appendix 1-3 to this brief. It is not suggested that this Court rest its opinion upon the materials included in the Appendices to this brief since they are not part of the record. They are included solely to illustrate the types of information currently being developed which Florida and other states should not be foreclosed from considering as they formulate appropriate policies on professional advertising.

number of those who had received direct-mail solicitations indicated that it had lessened their regard for the legal profession and the judicial process as a whole.

A small but statistically significant percentage of those who had received direct-mail advertising from an attorney stated that such advertising could influence the way they feel about lawyers or a civil trial in which they would serve as jurors because of its impact upon their attitude about the ethics and competence of lawyers and the viability of the case before them. Findings such as these would be highly significant in weighing the effect of direct-mail solicitation on the integrity of the judicial process against the necessity and value of this limited form of advertising.



## CONCLUSION

The Florida Bar respectfully urges this Court to affirm the decision of the Supreme Court of Kentucky or to discharge the writ certiorari for lack of a substantial question. If the Court declines to affirm, it is urged, in the alternative, to make clear that direct-mail solicitation by attorneys may be regulated or prohibited when facts of record establish that such regulation or prohibition serves a substantial governmental interest and there are ample alternative means of communication.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion and brief has been served by U.S. Mail upon Donald L. Cox, 1800 Meidinger Tower, Louisville, KY 40202; Frank P. Doheny, Jr., 2500 First National Tower, Louisville, KY 40202; C. Rufus Pennington, III, 218 E. Forsyth Street, Jacksonville, FL 32202 on this 22nd day of December, 1987.

## APPENDIX

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## SPECIAL COMMITTEE ON SOLICITATION FINAL REPORT

Summary of recommendations: Targeted direct mail solicitation should be abolished; new restrictions should be imposed on general direct mail advertising; forfeiture of fees should be added to the Bar's disciplinary arsenal for cases establishing improper solicitation; and The Florida Bar should file an amicus brief in *Shapero* v. *Kentucky Bar Association,* which is pending before the United States Supreme Court and which challenges an absolute ban on targeted direct mail solicitation.

### Background

The Special Committee on Solicitation was created in July and charged with the task of investigating reported improper or abusive solicitation by some members of The Florida Bar and with recommending measures to curb such misconduct. Specifically, the Committee was charged with determining:

1) Whether the Rules of Professional Conduct regulating solicitation conform to the mandate of the caselaw;

2) What time, place and manner restrictions are authorized or permitted by decisions of the United States Supreme Court;

3) What types of abuses, if any, have emerged in Florida;

4) What other states have done to regulate solicitation by lawyers; and

5) What amendments, if any, to the Rules and commentary are necessary and appropriate to conform the Rules to the mandate of the United States Supreme Court; to curb identified abuses; or to ensure that the public is protected from coercion, overreaching, deception or invasions of privacy on the part of soliciting lawyers.

In performance of this task the Committee has reviewed the caselaw, other states' regulatory efforts, newspaper accounts of improper solicitation and written comments and complaints submitted by members of the Bar and the public. In addition, the Committee conducted public hearings in four cities in October to

receive comments from members of the Bar and the public. On October 5, the day before the first of these public hearings, the United States Supreme Court granted certiorari in *Shapero* v. *Kentucky Bar Association.*

In its 1986 order adopting the Rules Regulating The Florida Bar, the Florida Supreme Court lifted the absolute ban on direct mail solicitation effective January 1, 1987. The court concluded that the ban was inconsistent with recent pronouncements of the United States Supreme Court. The Florida court stated, however, that if regulation of targeted direct mail solicitation, as provided for in Rule of Professional Conduct 4-7.3 (to be renumbered 4-7.4 effective Jan. 1, 1988), proved unworkable or a pattern of abuse was established, the court would consider amending the rule. 494 So.2d 977, 978.

Within six months after the rule became effective, newspapers throughout the state began to report that accident victims, bereaved spouses and parents, and other victims of misfortune were being inundated with the mailed importunings of Florida lawyers. Newspapers also reported that police departments were being burdened by lawyers' demands for copies of accident reports and that some lawyers were engaged in illegal and unethical solicitation in-person, by telephone and through agents.

As one of the first acts of his term, Bar President Ray Ferrero appointed this Committee to ascertain whether Florida lawyers were in fact abusing Rule 4-7.3 and what measures could be taken to halt any such abuses. The Committee filed an interim report with the Board of Governors at the September Board meeting. The report tentatively identified several amendments to Rule 4-7.3 that would be necessary to curb abuses and protect the public. The report further identified other measures under consideration. After further factfinding, this Committee has concluded that abuses by lawyers and harm to the public is inherent in direct mail solicitation and that, accordingly, the practice should be banned absolutely.



**Findings**

1) Most lawyers and nonlawyers oppose direct mail solicitation. This finding is supported by views expressed to Ray Ferrero during his speaking engagements before nonlawyer groups around the state, by informal polls of voluntary bar associations and sections of The Florida Bar, by letters to the editors of Florida newspapers, by newspaper editorials and by complaints received by The Florida Bar from lawyers and recipients of solicitation letters.

2) Direct mail solicitation has generated considerable negative publicity and condemnatory editorials for the legal profession and has caused public respect for and confidence in the profession and the court system to plummet. More than one Florida personal injury lawyer has encountered hostility or cynicism on the part of prospective jurors during voir dire, which suggests that innocent plaintiffs with meritorious claims may be injured by direct mail solicitation.

3) Direct mail solicitation infringes on recipients' right to privacy as guaranteed by the Florida Constitution. This infringement is particularly egregious because it often occurs during periods of emotional stress.

4) Direct mail solicitation cannot be effectively regulated because lawyers have no means of complying with the mandate of Rule 4-7.3 that solicitations not be mailed to anyone whose physical, mental or emotional state is such that they cannot make a reasoned decision whether to hire a lawyer. Similarly, in most instances lawyers have no means of determining whether an intended recipient has already retained counsel in the matter.

5) Complaints from recipients of lawyers' direct mail solicitations demonstrate that such solicitation often causes the recipient emotional distress at a time when the recipient is, by virtue of the misfortune prompting the solicitation, particularly vulnerable.

6) The use of public records to identify individuals with a specific legal problem has burdened law enforcement agencies and has caused distress and unease among targets who did not realize that their identity and their legal problem were open to scrutiny and opportunistic use by strangers.

# *Attitudes & Opinions Of Florida Adults Toward Direct Mail Advertising By Attorneys*

Prepared For The Florida Bar

By
***Frank N. Magid Associates***

December 1987



## *Introduction*

This report analyzes the results of the research designed to determine the opinions and perceptions of Florida adults toward direct mail advertising and solicitation by attorneys. Specifically, the research paid detailed attention to several questions:

1. The frequency with which Floridians have retained attorneys, the process used by legal clients to find and retain attorneys, and evaluations of that process. Special attention was paid in this section of the research to obtaining information on the way legal clients obtained information about attorneys and their satisfaction with the information about attorneys that is available to the public.
2. The attitudes and perceptions held by Floridians regarding any direct mail advertising or solicitation they have received from an attorney or law firm in the past.
3. The overall attitudes and perceptions of Floridians toward direct mail advertising by lawyers and, especially, the impact that this advertising and solicitation has on attitudes toward the legal profession and the judicial process.

These questions were probed in two separate statewide telephone surveys of Florida adults conducted for the Florida Bar by Frank N. Magid Associates. The first of the surveys was a statewide random sampling of Florida adults, age 18 and over. It was designed to be representative of the entire adult population of Florida. This first study will be referred to in this report as the "General Population" survey. The second survey was a random sampling of Florida adults who had received direct mail advertising or solicitation from an attorney or law firm during 1987. The sample used in the second study was drawn from a comprehensive list of such persons provided to Frank N. Magid Associates by the Florida Bar. The second study will be referred to in this report as the "Direct Mail Recipients" survey. A more detailed description of the methodology used in this research project follows at the conclusion of this report.

***Key Findings***

Overall, the results of both the general population and direct mail recipients surveys point in a clearly negative direction for direct mail advertising and solicitation by attorneys. While it is true that most Floridians concur that the legal or even constitutional right of lawyers to free expression extends to direct mail advertising, most also have highly negative attitudes and perceptions toward direct mail advertising by attorneys that extends along three separate dimensions. First, Florida adults hold highly negative attitudes toward the attorney-originated direct mail advertisements and solicitations themselves. Second, respondents have generally unfavorable feelings about the attorneys who utilize direct mail advertising. Finally, Florida adults seem to have some doubts about the impact of direct mail advertising by attorneys on the legal profession and the judicial process.

At a minimum, it is clear that Floridians have a less than positive perception of the direct mail advertisements and solicitations sent out by lawyers. It seems clear that these ads are not generally perceived to convey much information that is useful in informing people of their legal rights or in selecting an attorney. For example, only one-fifth or fewer of those who have recently received a direct mail ad or solicitation are completed convinced that the ad was "truthful," "informative," or "helpful." Only a third of all Florida adults and a quarter of those who have received direct mail ads from an attorney strongly believe that direct mail advertising by attorneys informs people of their legal rights.

Instead, a large majority in both surveys agree a lot that it is difficult to judge the competence or honesty of an attorney from direct mail advertising (71% in the recipients survey and 60% in the general public survey), and a plurality or more of respondents in both surveys strongly believe that direct mail advertising by attorneys is designed to appeal to gullible or unstable people and violates the privacy of those who receive such advertising.

In sum, it seems quite clear that Floridians tend to have negative perceptions of the specific direct mail ads sent out by attorneys. They perceive this advertising to have minimal informational



content and to contain messages that appeal to the emotions rather than to reason, especially of gullible or upset people.

It is quite probable that the less than favorable perceptions of the content of direct mail advertising by lawyers stems from satisfaction with the existing procedures most people use to retain an attorney. A majority of Florida adults (58% of the general population and 73% of the direct mail recipients) have retained an attorney at some time in the past. Of these, virtually all retained their attorney as a result of a recommendation from someone they knew or used an attorney they knew personally. No more than one in 20 of those who have used an attorney found their lawyer by any other means.

These methods of retaining an attorney appear to be quite satisfactory to almost all Floridians. About nine in ten persons in both surveys believe it was not at all difficult to find a lawyer when they needed one. A large majority (77% in the general public survey and 67% in the recipient's survey) believe they had enough information available to choose the best lawyer for their own needs. And about seven in ten in each survey claim to be completely satisfied with the way their lawyer handled their legal affairs.

Florida adults who have never retained an attorney do not hold substantially different attitudes toward the process of selecting a lawyer. Like those who have used a lawyer's service, most of these Floridians would utilize personal recommendations or an attorney they know personally should they ever need a lawyer. Beyond this, almost all believe it would not be at all difficult to find an attorney in this event. A large majority also feel they could easily get enough information to make a wise selection of an attorney should they ever require the services of one.

To summarize, Florida adults appear to be quite satisified with current procedures used by citizens to retain attorneys. Of greatest relevance in this research, they are highly satisfied with the information available to aid them in selecting the proper lawyer. It may be that this satisfaction with the current process of retaining an attorney and the information available to do so obviates the

necessity of relying on direct mail advertising. It may also contribute to the negative perceptions that Floridians have of direct mail advertising and lawyers who use it.

Not only do most Florida adults have negative feelings about direct mail advertising by attorneys, but they are also negative about those attorneys who use it. Evidence of these negative feelings about such attorneys runs widely through the research. At least a plurality of respondents in both surveys believe that an attorney who advertises via direct mail is likely to be inexperienced rather than experienced, shady rather than honest, and concerned with his or her own welfare rather than that of the client. A majority in both surveys (51% of the general public and 61% of the direct mail recipients) also perceive attorneys who advertise by mail to be different from most other lawyers.

It must be said that most Florida adults do hold some perceptions of lawyers who solicit by mail that appear, at least on the service, to be positive. Most agree that such lawyers are likely to be self-confident and aggressive on behalf of their clients. However, given the concerns of many that direct mail advertising by lawyers may contribute to unwarranted lawsuits, the perception that lawyers who advertise are self-confident and aggressive may be less positive that it appears on the surface.

Finally, the research provides evidence that direct mail advertising results in less positive attitudes toward the legal profession and the judicial process. A majority in both surveys agree, at least to some extent, that direct mail advertising by lawyers promotes unwarranted or frivolous lawsuits. A majority also feel that direct mail advertising by lawyers results in higher legal costs. Finally, a majority believe that it belittles the legal profession when lawyers advertise or solicit business by mail.

In fact, a significant number of those Floridians who have received direct mail advertising or solicitation from an attorney claim that this has lessened their regard for the legal profession and the judicial process as a whole. While two-thirds of such persons (66%) claim that their feelings about lawyers and the judicial process have not changed as a result of receiving direct



mail advertising from an attorney, more than one in four direct mail recipients indicate that their regard for lawyers and the judicial process is "lower" as a result of receiving direct mail advertising from an attorney or law firm.

Perhaps the most serious concern uncovered in this research is that the receipt of direct mail advertising may influence the decisions of potential jurors. Only one in ten (11%) of those persons who have already received a direct mail ad or solicitation from an attorney admit that this fact could influence the way they feel about lawyers of a civil trial in which they serve as jurors. The primary concerns of these persons are the ethics and competence of the attorneys and the viability of the law case in question. It is true that most people (83%) claim they would be impartial jurors in spite of receiving direct mail advertising from a lawyer. Still, it must be a matter of concern when a measurable number of persons are willing to express the highly unpopular and undesirable opinion that that they could even be biased jurors.

To this point, we have emphasized those research findings that are negative toward direct mail advertising and solicitation by attorneys. It must be said that most recipients do agree with some arguments supporting such advertising. A solid majority (65% in the general population and 57% among recipients) do agree strongly that lawyers, like other business persons, do have a right to advertise. A solid majority (57% in the general population and 58% among recipients) also strongly agree that direct mail advertising helps new, unknown lawyers by putting them in touch with potential clients. Yet, it is worth noting that in their positive responses to these items, Florida adults seem to perceive that the benefits of direct mail advertising accrue primarily to *individual lawyers* rather than to clients, the legal profession as a whole, or the judicial process.

On balance, the overwhelming direction of this research is negative toward direct mail advertising and solicitation by attorneys. Most Floridians seem generally satisfied with the current process utilized in retaining an attorney and with the information available to those who seek a lawyer. Most Floridians are also far less

than positive about the direct mail advertising used by lawyers, about the lawyers who use it, and about its impact on the legal profession and the judicial process.

# AMICUS CURIAE

# BRIEF

Supreme Court, U.S.
FILED
DEC 2
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-16

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

## BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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## CONSTITUTIONAL PROVISIONS, KENTUCKY CODE PROVISIONS AND AMERICAN BAR ASSOCIATION MODEL RULES INVOLVED

**First Amendment, United States Constitution**

Congress shall make no law . . . abridging the freedom of speech . . . .

**Fourteenth Amendment, United States Constitution**

No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States.

**Model Rules of Professional Conduct (1983)**

(Also adopted as the law of the Commonwealth of Kentucky)

**RULE 7.3 Direct Contact With Prospective Clients**

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in-person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

No. 87-16

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD D. SHAPERO,

*Petitioner*

*v.*

KENTUCKY BAR ASSOCIATION

*Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

## BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

### THE INTEREST OF THE AMICUS CURIAE

The American Bar Association promulgated its Canons of Ethics in 1908. It has since then been recognized as a leader in the establishment and promotion of ethical standards for the legal profession. The Model Code of Professional Responsibility which the Association adopted in 1969 was almost universally accepted by the states as the model for the ethical standards governing lawyer conduct. The standards most recently developed by the Association are the Model Rules of Professional Conduct, approved in 1983. They have to date been adopted with amendments in twenty-five states, have been recommended to the highest courts of nine other states for adoption, and are being considered for adoption in twelve additional jurisdictions.

At issue before this Court is the constitutionality of Model Rule of Professional Conduct 7.3, "Direct Contact With Prospective Clients," which the Supreme Court of Kentucky adopted verbatim as the law of the Commonwealth. The Rule is recommended by the Association to protect prospective consumers of legal services against the harms associated with solicitation for pecuniary gain not open to public scrutiny.

The American Bar Association is, therefore, vitally interested in the outcome of this case. The Court's finding will have a profound impact upon the conduct of lawyers and the formulation of the ethical standards with which they must comply.

## SUMMARY OF ARGUMENT

It is the position of the American Bar Association that a state may constitutionally prohibit targeted mail solicitation for pecuniary gain without a case-by-case showing that its contents are false or misleading because it may reasonably determine that such a prohibition is the least restrictive means by which the state can adequately protect the consumer public from the dangers inherent in such solicitation.

## ARGUMENT

### I. The American Bar Association's Deliberations on the Subject of Commercial Speech by Lawyers Led to its Adoption of a Model Rule Prohibiting Targeted Mail Solicitation for Pecuniary Gain

Model Rule 7.3, "Direct Contact with Prospective Clients," was adopted by the House of Delegates of the American Bar Association in August, 1983 as part of the Model Rules of Professional Conduct.



The Commission on Evaluation of Professional Standards, which had been established to review the American Bar Association's predecessor Model Code of Professional Responsibility and to make recommendations for its revision, proposed a rule very different from Model Rule 7.3. Its proposal, considered by the House of Delegates, the A.B.A.'s policy-making body, at the February, 1983 meeting of the Association, would have permitted commercially-motivated in-person solicitation under certain circumstances[1] and would have permitted targeted mail solicitation for pecuniary gain (unless on a case-by-case basis the content could be shown to be false or misleading) under all but three circumstances: 1) where the lawyer knew or reasonably should have known that the physical, emotional or mental state of the person was such that the person could not exercise reasonable judgment in employing the lawyer; 2) where the person has made known to the lawyer a desire not to receive communications from the lawyer; or 3) where the communication involved coercion, duress or harassment.

In the course of the ensuing House debate on the policy considerations and the law relevant to the proposed rule, an amendment jointly sponsored by the Association's Standing Committee on Professional Discipline and the State Bar of Michigan was adopted. That amendment deleted the proposed rule and replaced it with one prohibiting all direct solicitation, whether in-person, by mail, or otherwise, where the pecuniary gain of the lawyer was a significant motive.

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[1] In-person solicitation would have been permitted if the prospective client were a close friend, relative, former client or one whom the lawyer believed to be a client; if under the auspices of a public or charitable legal services organization; or under the auspices of a bona fide political, social, fraternal, civic, employee or trade organization whose purposes include, but are not limited to, providing or recommending legal services, if the legal services were related to the principal purposes of the organization.

Prior to final adoption, the Rule was amended to allow solicitation of employment from the lawyer's family and former clients.

Since the adoption of Model Rule 7.3 in 1983, the ABA Commission on Advertising has twice proposed that the rule be amended.[2] The first time, the proposal was withdrawn before the Association meeting at which it was to be considered. The second time the Commission proposed to amend Model Rule 7.3, in February, 1987, it was joined by the Standing Committee on Ethics and Professional Responsibility as co-sponsor. Their proposed change, pertaining solely to targeted mail solicitation for pecuniary gain, was in essence similar to the rule proposed by the Commission. The joint proposal was considered by the American Bar Association Board of Governors. After the Board recommended to the House that the proposal to amend Model Rule 7.3 be rejected, the proponents withdrew it.

Since 1983, twenty-seven states have scrutinized their rules governing lawyer solicitation.[3] In twenty-five of those states, such review was part of the states' consideration and eventual adoption of an amended version of the ABA Model Rules. In the other two instances, provisions of the states' codes of professional responsibility were re-examined.[4] These two state codes were revised to permit targeted mail solicitation for pecuniary gain. Fourteen of the twenty-five states adopting the Model Rules, however, adopted a rule

[2] Reports with Recommendations to the House of Delegates, Report 106, February, 1986; Report 120, February, 1987.

[3] Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Dakota, Utah, Washington, Wisconsin and Wyoming.

[4] Illinois and Massachusetts.



prohibiting such solicitation.[5] Two more states reserved final decision on a rule to apply to targeted mail solicitation for pecuniary gain.[6] An examination of the rationale relied upon by the states which decided to permit targeted mail solicitation for pecuniary gain suggests that many would have prohibited such solicitation had they not concluded (erroneously, we believe) that prior decisions of this Court had rendered such solicitation constitutionally protected and they, therefore, had no other option.[7]

Currently 26 jurisdictions permit targeted mail solicitation for pecuniary gain in one form or another; one jurisdiction limits it to business or commercial targets, and 25 jurisdictions prohibit it.

[5] Arizona, Arkansas, Delaware, Idaho, Indiana, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, South Dakota, Utah, Washington and Wyoming.

[6] New Mexico and Pennsylvania.

[7] Rules Regulating the Florida Bar (July 17, 1986) (per curiam) ("[R]ule 4-7.3, as originally proposed, prohibited direct mail solicitation of persons known to have specific legal problems. After studying this matter, we have concluded that such mailing cannot be prohibited."); Maryland Rules of Professional Conduct (April 15, 1986) (McAuliffe, J., dissenting) ("I suspect my colleagues who voted in favor of the rule [permitting direct mailing by attorneys to specific persons known to need specific legal services, when the motive for that direct contact is pecuniary gain] did so in the belief that any greater restriction on professional conduct would violate First Amendment guarantees relating to commercial speech . . . "); In re Amendment to S.J.C. Rule 3:07, DR 2-103 and DR 2-104, 398 Mass. 73, 495 N.E.2d 282 (1986) ("[b]ased on the . . . Supreme Court cases, we need not discuss the advisability, from a policy point of view, of disciplinary rules that would prohibit truthful, noncoercive, indirect lawyer solicitation of employment for a fee by such means as mail, leaflet, or electronic device, or solicitation on behalf of nonprofit organizations as in *In re Primus*. Such rules would not be constitutional."

## II. Targeted Mail Solicitation for Pecuniary Gain Lies Between In-Person Solicitation, Which May Be Subject to a Prophylactic Prohibition, and General Media Advertising, Which May Not.

This Court in *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978) determined that in-person solicitation by lawyers for pecuniary gain could be subject to prophylactic prohibition. Discussing the Ohio Supreme Court Rule applied in *Ohralik*, where a lawyer had solicited employment from accident victims at their hospital bedsides, the Court stated:

> The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

*Ohralik*, 436 U.S. at 464.

The Court identified specifically the adverse consequences of in-person solicitation:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided



> presentation and to encourage speedy and perhaps uninformed decision-making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual . . . . In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparision of the "availability, nature, and prices" of legal services, cf. *Bates* [citation omitted]; it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating "informed and reliable decision-making."

*Id.* at 457-58.

At the opposite end of the spectrum from the in-person solicitation in *Ohralik* lies general lawyer advertising. A now well-established line of cases beginning with this Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) has declared that lawyer advertising which is open to public scrutiny may not be prohibited except when it is shown on a case-by-case basis that its contents are false or misleading. *In re R.M.J.*, 455 U.S. 191 (1982); *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

General lawyer advertising serves the public interest by providing persons who may be in need of legal services with reliable information about the availability of lawyers, the circumstances in which legal representations may be called for, and the qualifications of the lawyers themselves. If truthful and not misleading, it has no adverse consequences for the consumer.

Targeted mail solicitation for pecuniary gain lies between in-person solicitation and general advertising of legal services. Although the Court has three times denied

writs of certiorari in cases which involved targeted mail solicitation for pecuniary gain, *In re von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985); *Dayton Bar Association* v. *Herzog*, 70 Ohio St. 2d 261, 436 N.E.2d 1037, *cert. denied*, 459 U.S. 1016 (1982), *In re Eaton*, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981), it has addressed targeted mail solicitation differently motivated in *In re Primus*, 436 U.S. 412 (1978). In its opinion, the Court suggested that the protection afforded the lawyer's solicitation letter, which was targeted to reach a specific client thought to be in need of legal services, rested upon the constitutionally protected rights of association and political expression which motivated the lawyer and are entitled to broader protection under the Constitution than the commercial speech which motivated the in-person solicitation in *Ohralik*, decided the same day.

The test developed by the Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980) to determine the constitutionality of a specific restriction on commercial speech has four parts: 1) the expression to be regulated must propose a lawful activity and not be misleading; 2) a substantial governmental interest must be at stake; 3) the regulation must directly advance that substantial governmental interest; and 4) the regulation must be no more extensive than is necessary to serve that interest. *Id.* at 566.

The application of this test in this case turns upon a determination of whether there are inherent and potential adverse consequences of targeted mail solicitation for pecuniary gain against which Kentucky cannot adequately protect its citizens by any regulation short of the prophylactic prohibition contained in the Rule at issue.



## III. Significant Dangers Attend Targeted Mail Solicitation for Pecuniary Gain.

The American Bar Association has concluded that the nature of targeted mail solicitation for pecuniary gain by lawyers and the circumstances in which it is employed render it inherently dangerous and misleading.

Unlike general media advertising, or even the targeted newspaper advertising occurring in *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), targeted mail solicitation for pecuniary gain is conducted out of public view. Its content, therefore, is almost as unlikely to be subjected to scrutiny by third parties able to recognize deceptive content as is in-person solicitation about which the Court noted: " . . . in-person solicitation presents unique regulatory difficulties because it is 'not visible or otherwise subject to public scrutiny.' " *Id.* at 641 (citing *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 466 (1978))

The form of targeted mail solicitation letters itself contains an inherent deception which is likely to create misapprehension and fear on the part of the recipient. Sophisticated computer technology now available to a soliciting lawyer seeking fee-generating cases permits the personalization of individual letters which are simply part of a mass mailing. This falsely suggests that the lawyer has some particular knowledge of the underlying matter being solicited and has determined upon a specifically tailored course of action. Such "tailored" messages permit the use of targeted mail solicitation for pecuniary gain to create a sense of immediacy, urgency and fear on the part of the recipient substantially similar to in-person solicitation. The significance of this sense of immediacy which distinguishes

direct, private solicitation from general media advertising in public has been noted by the Court:

> It is apparent that the concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement — and print advertising generally — poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement.

*Zauderer*, 471 U.S. at 642.

The letter of solicitation at issue in this case illustrates the potential for creating a sense of urgency or immediacy that can have coercive effect upon a prospective client. Petitioner Shapero's letter states:

> "Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling." (capitalization in original).



Petitioner's brief at p. 4.

In addition to the element of coercion that may be introduced in a targeted mail solicitation letter, the private nature of such communications presents the opportunity for communicating false information that is unlikely to be discovered. In *In re von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985) for example, the lawyer made false representations[8] which would not have come to light except for the fact that the solicited client filed a complaint with a disciplinary agency based upon the assumption that such form of solicitation was in violation of a disciplinary rule.

Intentional misrepresentations or falsehoods contained in targeted solicitation letters are not the only type of information likely to mislead, confuse or coerce the prospective client, however. Representations which prove to be incorrect or inaccurate, and which thereby mislead or cause fear in their readers, are a reality in situations where the recipient is unknown to the soliciting lawyer as anyone but a member of the mass group being targeted. In fact, specific information or advice communicated to a recipient whose name has simply been taken from a list of a class of persons will often be inappropriate to the underlying circumstances of the

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[8] The letter at issue there was sent to relatives of victims of the Hyatt Regency Hotel disaster in Kansas City, falsely representing that a "litigation coordinating committee" had been formed and that many of the victims' relatives had hired the lawyer to represent them.

recipient of which the lawyer is unaware. The court in *Leoni* v. *State Bar of California*,[9] 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), *appeal dismissed*, 475 U.S. 1001 (1986), identified the potential harm in a mass targeted mailing:

> This massive advertising [some 250,000 letters mailed at a monthly rate which ultimately reached 10,000] seemed to personalize letters to individuals named as

[9] In *Leoni*, each of the following occurrences resulted from communication of information that was not accurate or applicable to the circumstances in which the recipients were situated. One target, a judgment-proof corporation, was incorrectly advised that it could and should avail itself of a Chapter 13 bankruptcy. Another recipient was a defendant against whom a motion for summary judgment had been filed which he was actively opposing through retained counsel. Respondent's letter, which arrived while the motion was still pending, falsely suggested that the natural result of a civil action would be an adverse judgment and execution upon his assets. These misrepresentations upset the defendant and caused him to believe that his attorney was not adequately protecting his interests. Similarly, another defendant received a letter suggesting that an adverse judgment would be entered against her and her assets executed upon while a complaint for specific performance, which she was actively resisting through counsel, was pending. The receipt of that letter caused her also to question whether her counsel was adequately protecting her interests. Another person received a letter incorrectly suggesting that her wages might be subject to garnishment. The letter was sent to her at her place of employment, and read by her employer, who became upset about the possibility of garnishment of wages. Another inaccurate letter was sent to her at home, causing her husband to conclude that she had lied to him about the lawsuit. Another target of the letter campaign was a corporate recipient which had been the subject of a motion to enter a default. One day after the parties had stipulated to withdraw the motion from the calendar, the soliciting lawyer sent a letter about the pending default. The defendant's president interpreted that to mean that the plaintiff was still pursuing a default judgment and that something had occurred to undermine the stipulation of which he was unaware.

In each instance the lawyers had sent letters which contained representations which were inappropriate to the recipient. The targets, knowing that these individually addressed letters came from lawyers, therefore took their contents seriously and were thereby misled.



> defendants in pending lawsuits and was almost certain to cause panic and to mislead the recipients.

*Id.* at 628, 704 P.2d at 194, 217 Cal. Rptr. at 434.

The deception and confusion that results from targeted mail solicitation for pecuniary gain is not limited to messages addressed to the unsophisticated, one-time user of legal services. Even those recipients who are represented by counsel may feel unable to ignore letters they receive from another lawyer implying familiarity with their legal matter and containing conflicting advice. Rather, the solicitation letters may prompt them to question the representations made to them by their retained counsel.

Another result of targeted mail solicitation being out of public view is that falsehoods and misrepresentations contained in such letters will not be discovered and reported. Therefore, the likelihood that the deceptive content of targeted mail solicitation for pecuniary gain will result in disciplinary sanctions is remote. For example, the 250,000 targeted letters in *Leoni* generated only seven complaints. *Leoni*, 39 Cal. 3d 609, 618, 704 P.2d 183, 188, 217 Cal. Rptr. 423, 428 (1985), *appeal dismissed*, 475 U.S. 1001 (1986).

There can, moreover, be no practically effective requirement that targeted mail solicitation for pecuniary gain communicate only the type of substantive information which would, if deceptive, conceivably generate a complaint. A soliciting lawyer can simply write that he or she has important information concerning the recipient's specific legal problem, and urge the prospect, at no cost or obligation, to call for an appointment. Such a letter contains no representation which could even arguably be subject to evaluation. It could not be the subject of a complaint under any circumstance if targeted mail solicitation for pecuniary gain is permitted. Such a letter, however, can exert the same

type of pressure and demand for immediate response as does in-person solicitation, with the same lack of opportunity for thoughtful reflection, comparison or consultation. That sort of letter, if acted upon by the recipient, makes available to the soliciting lawyer a lawful opportunity to arrange an in-person encounter, the dangers of which are so substantial that the court determined in *Ohralik* it could be constitutionally subject to a prophylactic prohibition.

Obtaining an opportunity for an in-person encounter without affording the consumer an opportunity to deliberate on the available alternatives appears to have been the very purpose of the Petitioner's proposed solicitation letter, discussed, *supra*.

## IV. A State's Determination That Methods of Regulation of Targeted Mail Solicitation for Pecuniary Gain, Short of Prohibition, Would Be Ineffective to Adequately Protect the Consumer Public from Harm Does Not Violate the Constitution.

The states may reasonably conclude as has the ABA that various measures short of a prophylactic ban on targeted mail solicitation for pecuniary gain which have been suggested would adequately protect the public from the harm of misleading, deceptive and coercive communications are, in fact, inadequate.

One suggested safeguard is to require that the designation "Advertising" be stamped on any targeted mailing. *See, e.g., In re R.M.J.*, 455 U.S. 191, 206 n.20 (1982); *Adams* v. *Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, 801 F.2d 968, 974 (7th Cir. 1986); and ABA Model Rules of Professional Conduct Rule 7.3 comment (1983). This suggestion was made to reassure those who might be unaccustomed to receiving letters from a law office and might be frightened thereby.



This requirement does nothing to protect the public from the deceptive content of targeted mail solicitation, or to assure the accuracy and reliability of its contents.

As discussed, *supra* p. 9, computer technology produces highly personalized targeted mail solicitations, tailored to an individual recipient, making it highly unlikely that the word "advertisement" would effectively convey any meaning. The term "advertisement" generally connotes information made known to the public. *See* Webster's Ninth New Collegiate Dictionary 59 (1986). The type of information contained in a "tailored" solicitation letter, however, creates the impression that the soliciting lawyer possesses private information about the recipient.

Another suggestion that has been proposed is that all solicitation letters be filed with a state regulatory agency. *See R.M.J.*, 455 U.S. at 206; *Adams*, 801 F.2d at 974; *In re von Wiegen*, 63 N.Y.2d 163, 176, 470 N.E.2d 838, 845, 481 N.Y.S.2d 40, 47 (1984), *cert. denied*, 472 U.S. 1007 (1985) (*citing In re Koffler*, 51 N.Y.2d 140, 150, 412 N.E.2d 927, 933, 432 N.Y.S.2d 872, 878 (1980), *cert. denied*, 450 U.S. 1026 (1981)). But this approach, as a practical matter, would be ineffective.

A filing requirement could, in fact, alert the state agency to that rare letter which is deceptive on its face. However, no agency could reasonably be expected to be familiar with the circumstances surrounding the legal affairs of each targeted prospect. An agency, therefore, could not determine whether the contents of a solicitation letter which is not deceptive on its face is relevant or appropriate to that targeted legal problem. Nor could the agency determine whether the letter contains information which as applied to the recipient is, in fact, false or misleading.

Thus, the state may reasonably conclude that it cannot protect against deception in targeted mail solicitation for

pecuniary gain without investigating each solicitation letter by letter. That, of course, is a practical impossibility since disciplinary agencies lack the necessary resources to investigate the volume of solicitation letters that would be generated if targeted solicitation for pecuniary gain were generally permitted. As is demonstrated in *Leoni* v. *State Bar of California*, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985), *appeal dismissed*, 475 U.S. 1001 (1986), this volume has already risen to the level of 10,000 letters per month from a single law firm. There is nothing to prevent far greater volume by far more participants in the future.

The Court has acknowledged that difficulty of enforcement is a reality which may be taken into account when determining the extent of permissible restriction on lawyer efforts to secure employment for pecuniary gain:

> Indeed, the Court [in Bates] recognized the special possibilities for deception presented by advertising for professional services. The public's comparative lack of knowledge, the limited ability of the profession to police themselves, and the absence of any standardization in the 'product' render advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling.

*In re R.M.J.*, 455 U.S. at 202 (1982).

Similarly, no reviewing authority is likely to be sufficiently familiar with the record or reputation of every lawyer who might choose to engage in targeted mail solicitation for pecuniary gain to determine whether the representations



therein concerning the lawyer or lawyer's practice are truthful or deceptive.[10]

Another alternative short of a prophylactic ban on all targeted mail solicitation for pecuniary gain which has been suggested to protect the public from potential harm is to prohibit any mailing under certain specific circumstances: 1) where the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing the lawyer; 2) where the person has made known to the lawyer a desire not to receive communications from the lawyer; or 3) where the communication involves coercion, duress or harassment. This approach had been proposed by the Commission, and other ABA entities. *See* discussion *supra* pp. 3-4.

But as the proponents of present Model Rule 7.3, which replaced the proposed Commission provision with a ban on targeted mail solicitation for pecuniary gain, pointed out to the ABA House of Delegates, the Commission approach

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[10] Thus, a filing requirement would not have alerted the agency to the deceptive or misleading contents of the letters which were the subject matter in *Leoni*, *see* discussion *supra* p. 12 note 9, and in *In re Von Weigen*, *see* discussion *supra* p. 11 note 8. Nor would such a filing requirement have alerted the agency to the false and misleading representations in media advertising had they been communicated by means of targeted mail not open to public scrutiny. *See, e.g., In re Zang*, 741 P.2d 267 (Ariz. 1987) (lawyers' advertisements falsely suggested their skill in trying lawsuits when in fact they had never tried a lawsuit to completion); *Kentucky Bar Association* v. *Gangwish*, 618 S.W.2d 176 (Ky. 1981) (advertisement was placed under a corporate name when the company was not in fact incorporated); *In re Zimmerman*, 287 S.E.2d 474 (S.C. 1982) (advertisement of specialization in areas of law in which lawyer had no experience); *In re Campbell*, 113 Wis. 2d 715, 335 N.W.2d 881 (1983) (lawyer participated in an employer-employee relationship with another lawyer but advertised and held out to the public that the relationship between the two was a partnership).

was unlikely to be effective. *See* ABA, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* 183-84 (1987). It would necessarily rely, in all but rare circumstances, upon case-by-case enforcement, the inadequacies of which have been discussed *supra*.

Disciplinary agencies and other third parties would not generally be in a position to know a targeted mail recipient's physical, mental or emotional state was so impaired that he or she could not exercise reasonable judgment in employing a lawyer. Moreover, even if the recipient's condition could somehow be determined, there is substantial doubt that sufficient proof could be marshalled to overcome the lawyer's inevitable contention that he or she did not know and could not have known the extent of that impairment before the solicitation letter was sent.

The exception which would prohibit targeted mail solicitation to a prospect who had made known a desire not to receive lawyer communications could not protect those who did not want to be importuned since the prospect could not know in advance whom to so notify.

Moreover, this exception itself seemed to foster a further problem, in that it appeared to sanction repeated attempts to importune a prospect following the initial contact unless the prospect affirmatively made known a desire not to receive further communication.

Finally, where a lawyer successfully employed coercion, duress, or harassment practiced out of public view, it would be unlikely to come to the attention of disciplinary agencies or other third parties, at least not before the harm had occurred. Even if such conduct were uncovered, it would not be readily susceptible to proof adequate to overcome the soliciting lawyer's defenses of inadvertence or lack of willfulness.



A state such as Kentucky may reasonably conclude that because of the ineffectiveness or unenforceability of these various proposed alternative restrictions, a prophylactic prohibition of targeted mail solicitation for pecuniary gain is no more extensive than necessary to directly advance the state's substantial interest in protecting its citizens against harm, within the meaning of *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557 (1980).

Such a prohibition does not prevent the communication of information important to prospective consumers of legal services. It merely prohibits the use by lawyers of one form of communication which is uniquely subject to misuse, while permitting others. For example, this Court's decision in *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), expressly sanctioned advertising which offers specific legal advice in order to provide prospective clients with information which might be useful to them.

A recent occurrence serves as an example of how media advertising is available to reach people who may have a need for information about legal services, but are so situated that private, direct mail importuning for fee-generating retainers would constitute a gross invasion of their privacy and seriously risk overreaching them.

In the days immediately following the crash of Northwest Airlines Flight 255 near Detroit on August 16, 1987, with a loss of 156 lives, a number of lawyer advertisements targeting the families of the victims appeared in newspapers published in Detroit. The state could reasonably conclude, as does Michigan, that this advertising was an adequate method by which lawyers could communicate their availability. Direct, private mail communication with the family of each victim by every lawyer who engaged in media advertising following the crash would not only have constituted an

impermissible breach of privacy but would have risked the likelihood that the families would be pressured into making important and irrevocable decisions at a time when their judgment and instinct for self-protection might well have been overwhelmed by their tragic personal loss.

The Kentucky Rule incorporating ABA Model Rule 7.3 leaves numerous alternatives available to lawyers offering information to prospective consumers of legal services as well. The Rule permits in-person solicitation, targeted mail and all other forms of solicitation conducted in furtherance of pro bono obligations or rights of association and political expression since there is no significant pecuniary motive. It permits general mailings announcing a lawyer's availability, even for pecuniary gain. It permits a lawyer to provide private, targeted advice or information about the need for legal representation so long as the lawyer does not benefit financially by obtaining employment as a result thereof. It permits any targeted advertising open to public scrutiny, regardless of motive, absent a determination on a case-by-case basis that its contents are false, fraudulent or misleading.

The Rule simply prohibits all forms of targeted solicitation not subject to public scrutiny where a significant pecuniary motive is present.

The Kentucky Rule now before the Court thus assures a free flow of information about the nature and availability of legal services, while protecting the consumer against the dangers inherent in targeted solicitation for pecuniary gain not open to public scrutiny.

## CONCLUSION

The decision of the Supreme Court of Kentucky should be affirmed.